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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM V. MUSTO, FRANK SCARAFILE,
JOHN J. POWERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioners were deprived of their Constitutional rights under the Fifth Amendment because of discrimination in the selection of grand jury forepersons? This raises the collateral issue of whether the disagreement among the Circuits on this issue should now be resolved by this Court?

2. Whether a valid verdict of guilty, by twelve jurors, was returned, in view of the fact that the Trial Court failed to inquire of the veniremen whether they had reached a verdict prior to polling them?

3. Whether the District Court erred in failing to take appropriate action to ensure that a unanimous verdict had been returned by twelve competent jurors, and that no juror had been coerced or induced to agree to a verdict to which she had not freely assented?

4. Whether, after partially polling the jury following its alleged verdict and learning that at least one juror dissented from that verdict, the Court was obliged to hear the dissenting juror's request to speak to the Court before returning the panel for further deliberations?

5. Whether, after the Court had learned during the deliberations of the jury, from at least one juror, that she was being subjected to pressure and coercion by other jurors, the Court erred in returning the talisman to the jury room for further deliberations following a poll which revealed lack of unanimity among the jurors, without first giving them further instructions and determining whether improper pressure and coercion were being exercised by some jurors against others?

6. Whether the Trial Judge erred in ruling that it must be guided by what it hears during the pronouncement of a verdict and the polling of jurors, rather than what it sees happening in the courtroom at the time? (UNITED STATES v. MUSTO, 540 F.Supp. 318 [D.N.J., 1982]).

7. Whether during the deliberations of the jury itself, the Trial Court had a right to speak to one of the deliberating jurors outside the presence of counsel and off the record, to determine her fitness to continue deliberating?

8. Whether petitioner Musto was deprived of a right of confrontation and a fair trial when the Trial Court limited his counsel's right of cross-examination of the most essential witness against him, because the cross-examination would perhaps impact adversely upon other defendants in the case?

9. Whether the Trial Court erred in failing to grant a severance to petitioner Musto, in view of its ruling that his lawyer was forbidden to cross-examine an essential witness because of possible prejudice to co-defendants by such examination?

10. Whether this Court should once and for all resolve the issue left unsettled in UNITED STATES v. WHITE, 401 U.S. 745, as to whether Court orders are required for warrantless electronic participant monitoring where only one party has knowledge of the use of electronic recording equipment?

11. Whether the Fourth Amendment of the United States Constitution circumscribes warrantless electronic intrusions as effectively as it limits corporeal invasions of privacy? And whether the protections of the Fourth Amendment are diluted if the person subjected to warrantless electronic intrusion is suspected of a crime?

12. Whether the District Court erred in permitting the jurors to use transcripts of the highly critical tape recordings, which were the main evidence in the case at bar, as substantive aids to their deliberations, without having available the tape recordings themselves?

13. Whether Rules 23(b) and 24(c) of the Federal Rules of Criminal Procedure should have been invoked to resolve the issue of the incapacity to serve of Juror No. 9 (Mrs. Steidl)?

THE PARTIES

The parties in the United States Court of Appeals for the Third Circuit were the petitioners herein, as well as appellants Gildo Aimone, Lawrence Dentico, Dominick D'Agostino, and Anthony Genovese, as well as the respondent herein.

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ONCE AND FOR ALL, WE ASK THIS COURT TO RESOLVE THE DILEMMA WHICH EXISTS BECAUSE OF THE DECISION IN *UNITED STATES v. WHITE*, 401 U.S. 745, 28 L.Ed.2d 453, WHICH WAS A PLURALITY OPINION OF THIS COURT, AND WHICH ALONE IS RELIED UPON BY LOWER COURTS TO AUTHORIZE PARTICIPANT MONITORING AND TAPING OF CONVERSATIONS WITHOUT COURT ORDER, UPON THE PRETEXT THAT ONE OF THE PARTICIPANTS TO THE CONVERSATION HAS CONSENTED THERETO. 35

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OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Third Circuit is annexed hereto as part of the appendix. The District Court opinion is reported Sub. Nom. United States v. Musto, 540 F.Supp. 346 (D-N.J. 1982).

JURISDICTION

(a) The judgments of convictions were rendered on the 13th day of May, 1982, convicting the petitioners of a majority of the 46 counts of the indictment herein, charging conspiracy and substantive violations of the so-called "RICO" statute, 18 U.S.C. §1962, as well as substantive violations of other federal laws, including mail fraud, wire fraud, extortion, and interstate travel in aid of racketeering. (41a-109a)* The indictment defined the "RICO" enterprise as being comprised of defendants Principe (who was not tried), Dentico, and D'Agostino, the unindicted co-conspirator Rudolph Orlandini, and the Orlando Construction Company, which was allegedly controlled by the individual members of the enterprise. (112a) The indictment alleged that the other defendants, Musto, Powers, Scarafile, Genovese, Bertoli, and Aimone, were "associated" with the "RICO" enterprise and used their public offices and political influences to promote and further the affairs of the enterprise (113a).

The indictment further described a number of alleged schemes whereby the enterprise members paid bribes to other defendants in return for various politically-related favors, including such things as tax abatements and government approval for construction of publicly financed housing projects; obtaining of local government contracts and approvals for allegedly undeserved payments relating to renovations and additions to certain Union City high schools; and, political influence in promoting the purchase by Union City of certain real estate owned by members of the enterprise. (112a-141a)

(b) The order and judgment of affirmance of the United States Court of Appeals for the Third Circuit is dated August 25, 1983, but a petition for rehearing was filed, and the Circuit Court denied the petition for rehearing on September 19, 1983.

(c) Jurisdiction to review the judgments herein by certiorari is conferred under 28 U.S.C. §1254(1) and Rules 17.1(a) and (c)

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* Numerals in parentheses with the suffix "a" refer to pages of the appendix submitted to the Court below. Where no suffix letter is used, the numbers refer to pages of the official court reporter's minutes of the trial proceedings.

of the Rules of this Court. Copies of the order of affirmance and order denying a rehearing are annexed in the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

The Fifth Amendment of the United States Constitution provides, inter alia:

> "No person shall be held to answer for a[n] infamous crime except on a presentment or indictment of a Grand Jury. . .
>
> No person shall be deprived of life, liberty or property without due process of law."

The Sixth Amendment of the United States Constitution provides, inter alia:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The law points which follow basically state the case, so far as the points involved are concerned.

This was a "RICO" prosecution under 18 U.S.C. §1962, as well as for substantive violations of other federal laws, including

mail fraud, wire fraud, extortion, and interstate travel in aid of racketeering (41a-109a).

The indictment defined the "RICO" enterprise as being comprised of the defendants Dentico and D'Agostino, and one Principe, who was not tried. In addition, it included the unindicted co-conspirator Rudolph Orlandini, and the Orlando Construction Company, which was supposedly controlled by the individual members of the enterprise (112a).

The indictment alleged that the other defendants and petitioners herein, Musto, Powers and Scarafile, along with Genovese, Bertoli and Aimone, were "associated" with the "RICO" enterprise and used their public offices and political influences to promote and further the affairs of the enterprise (113a).

The evidence in the case consisted primarily of the testimony of Rudolph Orlandini, so far as the petitioners herein are concerned, together with tape recordings which were made by Orlandini, under the auspices of the Government.

The witness Orlandini was on the witness stand for an extremely long period of time and there is no doubt but that the case rested upon his credibility for the most part, together with the tape recordings which he allegedly made.

The points *infra* detail the facts which are pertinent to the legal issues which we are raising herein.

INTRODUCTORY

This petition is submitted on behalf of three petitioners. We ask this Court to bear in mind that pursuant to motions made *in limine* it was understood that objections made by one lawyer would redound to the benefit of all lawyers, unless expressly disavowed by any particular attorney.

At the commencement of the proceedings counsel for Senator Musto made a motion *in limine* objecting to the use of the electronic recordings made under the auspices of the Government by Rudolph Orlandini, the main witness for the prosecu-

tion, who was also an unindicted co-conspirator. The basis of this motion was that this Court had never passed upon the issue of participant monitoring where the subject of the recordings made by such participant was unaware of the recording.

United States v. White, 401 U.S. 745, 28 L.Ed.2d 453, was specifically cited as the precedent by which the Government assumed that it could conduct such eavesdropping without court order.

The Trial Court was also apprised of the fact that since the factual predicate underlying *United States v. White, supra*, was established prior to the decision of this Court in *Katz v. United States*, 389 U.S. 347, that there had therefore never been a majority holding by this Court that participant monitoring of the type used herein was admissible without Court order. We have devoted a point, *infra*, addressed to this important matter. The Court below denied the motion to suppress the tapes.

Rudolph Orlandini, who was the most important witness for the Government, and upon whom the entire prosecution basically rested, was an admitted perjurer and a person who concededly had violated the law on a number of occasions. It was therefore quite important for the Government to try to bolster his credibility through the use of electronic recordings, which were surreptitiously made by Mr. Orlandini at their request.

With respect to Senator Musto, only a single recording of a conversation was made, although Mr. Orlandini admitted that he had two conversations with Senator Musto on the day in question. He claimed that at the second conversation, for some strange reason, the recording device did not operate.

In this context, it should be noted that counsel for Senator Musto sought to inquire as to the type of surveillance equipment the law enforcement authorities had available to them and what sort of equipment was in fact used by Orlandini and the Government when the recording of Senator Musto was made. Objection was made by counsel for other defendants and the Court precluded counsel for Senator Musto from inquiring into that aspect.

Since the credibility of Orlandini was crucial, and the integrity of the tape recording was vital, a motion for a severance was made by Senator Musto's counsel, which was denied. But, to exacerbate matters further, the Court forbade Musto's lawyer from inquiring further along those lines, not on the grounds that it would be irrelevant or improper, but rather because it would impact unfavorably upon one or more of the defendants. Thus, a question of the right of confrontation under the Sixth Amendment, and a fair trial under the Fifth Amendment, were involved, because obviously Senator Musto could not defend himself in the same manner as he could if he was being tried alone. This, too, is the subject of a separate point, *infra*.

Throughout the trial there were a number of occasions where severances were requested by various counsel because of the fact that the Government had chosen to incorporate so many defendants and so many counts into a single indictment, that it was virtually impossible to prevent prejudicial spillover.

In connection with the inability of Senator Musto to completely and adequately cross-examine the most crucial witness against him, Rudolph Orlandini, it should be noted that Mr. Orlandini conceded that not only did he never make any payments to Senator Musto at any time, but that he never saw anyone else make any payments to Senator Musto.

We submit, therefore, that standing alone without the aid of any listening and recording devices, the credibility of Rudolph Orlandini would have been virtually worthless as far as the petitioners, especially Senator Musto, were concerned, but with the inability on the part of Senator Musto to adequately cross-examine that witness concerning the manner in which the electronic listening device was operated was so prejudicial as to deny him a fair trial and an effective right of confrontation.

As the "Questions Presented" already reveal, the Court created serious errors in connection with the jury deliberations verdict.

During the progress of the deliberations themselves, one juror, Mrs. Steidl, in essence, bolted from the jury room in a

state of hysterics, and refused to deliberate further. The Court reported that she was crying and indicated she was being put under tremendous pressure. The Court said ". . . she indicated that . . . she was hysterical because of the pressure of the deliberations." (530a-537a). She further indicated that the pressure emanated from the foreperson.

The Court conducted *ex parte, in camera* interviews of this juror, outside the presence of counsel, on two occasions, with the acquiescence of counsel. On both those occasions, the Court indicated that the juror was in a total state of hysterics, that "pressure is making her sick and that she does not think she can continue to serve as a juror" (531a-532a).

The Court then recessed for lunch, with the understanding that after lunch there would be a determination as to what to do with this juror.

Without consent of counsel, over lunch, the Court apparently had a third clandestine interview with this juror and reported, quite surprisingly, that she had changed her mind and said she could sit. No opportunity by counsel to interview this witness was ever afforded, other than one brief confrontation where she was asked the simple question whether she could continue, and the answer "yes" was elicited.

The Court never reduced to writing what the substance of its conversations with this juror had been, nor was any court reporter ever present during these secret conversations. Under the circumstances, no record exists as to what was said between the Court and this juror. This raises a serious question as to whether the rights of the petitioners herein were protected, since at no time were they ever privy to the conversations, nor did they ever have an opportunity to probe the verity of what the Court transmitted as having occurred.

This raises a crucial issue as to whether, under Rules 23(b) and 24 (c) of the Rules of Criminal Procedure, the Court should have sought to either substitute another juror, if that was possible, or declared a mistrial. There had never been any unani-

mous consent for the retention of alternate jurors for the replacement of a disabled or incapacitated juror.

Under the circumstances, the Court deprived the petitioners of a fair trial and has prevented effective appellate review of the issue.

Counsel for Senator Musto specifically requested that the Court reduce to writing its best recollection of the conversations which had taken place, but so far as we know, this had never been done.

To exacerbate the situation further, during the pronouncement of the verdict, a different juror (Juror No. 4—Mrs. Melnick) suddenly declared, during the poll of the jury, that she had not concurred in the verdict, and again the Court refused any opportunity to interview this juror, although she specifically declared that she wanted to talk to the Court before she returned to the jury room.

The Court had never completed the poll of the jurors upon the pronouncement of the verdict, because it halted its poll with Juror No. 4, who declared that she had not agreed with the verdict. The jury was told that they had not reached a verdict, and without further instructions, were sent back to the jury room.

Upon returning from the jury room again, the Court did not inquire whether a verdict had been reached, but merely read a note of the jury to the effect that the Court should *continue the poll.*

The Court, upon bringing the jurors out again, did not inquire whether they had reached a verdict and, rather than continuing the poll with Juror No. 5, or inquiring whether a verdict had been reached, started the poll anew without ever asking the foreman what the verdict was.

The Court, in essence, ruled that irrespective of what it "saw", it was guided solely by what it "heard". Mrs. Melnick obviously answered "yes" to this poll, but visibly was shaking her head in the negative and was crying hysterically. This ap-

peared to also be true of at least one other juror, Mrs. Steidl, who had previously complained about pressure. Thus, we maintain no proper verdict was ever obtained.

A serious issue dividing the Circuits exists with respect to the selection of Grand Jury forepersons which petitioners maintain were discriminatorily weighted against women.

The foregoing are only some of the important matters presented in this petition.

POINT I

THE PETITIONERS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT, BECAUSE OF DISCRIMINATION IN THE SELECTION OF GRAND JURY FOREPERSONS.

THERE IS DISAGREEMENT AMONG THE CIRCUITS ON THIS ISSUE, WHICH SHOULD BE RESOLVED BY THIS COURT.

The Court below, as well as the District Court, recognized that a serious issue existed with respect to the process for selecting grand and petit jurors and grand jury forepersons, as being discriminatory on a variety of grounds, including race, nationality, and sex.

On the appeal, however, the petitioners emphasized that the indictment should be dismissed "because women were not properly represented as grand jury forepersons in the District of New Jersey". (Slip opinion, U.S. Court of Appeals, p. 7).

The District Court acknowledged that the allegations that a proportionate number of women had not been appointed as forepersons over a five-year period, was a fact.

The District Court found that of 25 forepersons and 25 deputy forepersons selected between April 1976 and July 1981, only 2 forepersons and 3 deputy forepersons were female. (See *United States v. Musto*, 540 F.Supp. 346, 357-59 [D.N.J. 1982]).

Fed.R.Crim.P 6(c) provides that the court shall appoint one of the impaneled grand jurors to act as foreman and one as

deputy foreman to act in his absence. The foreman administers oaths, keeps a record of the number of jurors concurring in the finding of an indictment, and signs all indictments. It has been held, however, that the absence of the foreman's endorsement is only a technical irregularity and not fatal to the indictment. *Frisbie v. United States*, 157 U.S. 160, 163-65 (1895).

The Court below has correctly noted that the Supreme Court has not decided whether grand jury forepersons have such a significant impact on the criminal justice system that discrimination in their selection amounts to a Constitutional violation. Thus, in the opinion of the Court below, the Court of Appeals noted as follows (Slip op., pp. 8, 9):

> "The *Supreme Court has not decided whether grand jury forepersons have such a significant impact on the criminal justice system that discrimination in their selection amounts to a constitutional violation.* In *Rose v. Mitchell*, 443 U.S. 545, 551-52 n.4 (1979), the Court "assume[d] without deciding that discrimination with regard to the selection of only the foreman requires that a conviction be set aside. It found, however, that discrimination had not been established. (Emphasis ours).

In *Rose* the Supreme Court assumed only for purposes of that case that the Tennessee foreman had a significant role. In *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit found, however, that a Louisiana state foreman with less power did occupy a controlling position, and in *United States v. Cross*, _ F.2d _ (11th Cir. June 30, 1983) (No. 81-7783), the Court of Appeals for the Eleventh Circuit reached the same conclusion with respect to federal grand jury forepersons in the Middle District of Georgia, *see also United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982)."

The Court of Appeals below held, however, that the District Court was correct in determining that "the duties of the federal foreperson are only ministerial". It added, however, (id. p. 9):

> "We acknowledge the contrary conclusion in *United States v. Cross*, but point out that forepersons in the

Middle District of Georgia were found to perform certain functions not exercised by forepersons in the District of New Jersey. *Compare Cross*, slip op. at 3778, *with United States v. Musto*, 540 F. Supp. at 359. The differences may be attributable to custom and practice that have developed in the respective districts. In any event, we are not persuaded that the duties performed by a federal foreperson confer the power to control the decision-making process of the grand jury."

For this reason alone, Certiorari is warranted.

POINT II

THE INCIDENTS WHICH OCCURRED DURING THE DELIBERATIONS OF THE JURY WERE SO BIZARRE AND PREJUDICIAL AS TO PRECLUDE A PROPER AND FAIR DELIBERATION AND NECESSITATED THE GRANTING OF A MISTRIAL, WHICH THE COURT NEVERTHELESS REFUSED TO CONSIDER.

DURING DELIBERATIONS, JUROR NO. 9 (STEIDL) BOLTED FROM THE JURY ROOM IN A STATE OF HYSTERICS, AND TOLD THE JUDGE SHE COULD NOT CONTINUE DELIBERATIONS BECAUSE OF PRESSURE PUT UPON HER. DURING THE POLLING OF THE JURY, FOLLOWING THE VERDICT, JUROR NO. 4 (MELNICK) DISSENTED FROM THE VERDICT.

IN BOTH INSTANCES, THE COURT FAILED AND REFUSED TO MAKE A RECORD OF ANY CONVERSATIONS WITH THESE JURORS, AND, IN THE CASE OF STEIDL, HELD PRIVATE COLLOQUIES WHICH WERE NEVER RECORDED OR RECAPITULATED. THUS, THE PETITIONERS WERE DEPRIVED OF A FAIR VERDICT.

Based upon the Introduction of this petition, we have already apprised this Court of the fact that at least two bizarre and prejudicial incidents occurred during the deliberations of the jury.

Mrs. Steidl, Juror No. 9, in effect bolted from the jury room juring deliberations and refused to continue deliberating, claiming, hysterically, that she was being placed under tremendous pressure by the foreperson.

The Court held private, unrecorded, conversations with this juror on two occasions, with the reluctant acquiescence of the defendants. Following the second conversation, the Court indicated that the situation had deteriorated and that the juror could not resume deliberations.

Following a recess for lunch, the Court revealed that it had conducted a third *ex parte*, unrecorded, conversation with the juror and that she had indicated that she would continue to deliberate if that is what the Court wanted her to do. The Court had no permission or acquiescence from counsel for this third conversation.

Unlike both of the earlier interviews with Steidl, there was no advance request by the court for consent to this third *ex parte* off-the-record discussion.The court itself noted, in an opinion discussing the issues here addressed, that it assumed that it had "the continuing authorization of counsel" and had "decided to make one final effort to determine if Mrs. Steidl would and could continue to serve." *United States v. Musto*, 540 F. Supp. 318, 324 (D.N.J. 1982) ("*Musto Jury Opinion*"). Clearly, there was no such "continuing authorization" as evidenced by the concern of counsel over the contact. *See* remarks of Mr. Silber (597a). Moreover, the contact was in the face of counsel's early requests to be fully informed *before* the court took any action with respect to this explosive situation. *See* remarks of Mr. McAlevy (533a).

By the court's unilateral decision to pursue contact with the juror, then, all options but two were foreclosed: counsel could accept the substitution of an alternative or they could continue with Steidl. The court did state that if Steidl remained, the jury would be instructed that the court had been "informed that one or more jurors are displeased with the conduct of the deliberations and believe that undue or unfair pressure has been brought

to bear upon them" and that each juror should vote his or her own conscience. (591a)

Counsel then tried to evaluate the available tools to mitigate against unfair pressure. (592a-595a) After reaffirming that defense counsel's only alternatives were to go with an alternate or to retain Steidl (596a), the court was asked to and did relate the substance of its third conversation with Steidl:

> THE COURT: I called her back in, as I brought out during the discussion during lunch, and I said, "Mrs. Steidl, if I do not excuse you and do not put an alternate in your place, do you think that you could continue to serve?"
>
> And she indicated to me that she was upset but that if I wished her to do it she was certain that she could do it.
>
> I said "Thank you very much. I will inform counsel."
>
> That was the extent of our discussion. (597a-598a)

Mr. Silber, jointed by Messrs. Flood and Ford, then moved for a mistrial based on the totality of the circumstances especially the pressure exerted by the foreperson. (598a,603a-604a)

Mr. Arsenault and Mr. Hayden concluded that Steidl should remain, given the two alternatives (592a,599a); Messrs. Anolik and McAlevy asked for either a full *voir dire* or a mistrial. (606a-607a) The government took the position that Steidl *should not remain on the jury*. (609a)

Following a note from the jury foreperson on March 25, 1982, that "We are hopelessly deadlocked" (626a), the Court refused to grant a mistrial upon application of the defendants and petitioners. The next day a note was received that a verdict had been reached.

Following a poll of the jury, however, Juror No. 4, Mrs. Melnick, announced that she had not agreed with the verdict.

The result of this "no" in the emotion-charged atmosphere was dramatic. In the words of the trial court, "pandemonium broke out in the courtroom." *Musto Jury Opinion*, 540 F. Supp. at 329. Spectators and counsel alike leapt to their feet, and all attorneys demanded that the poll be continued or that the jury resume deliberations. *Id.* The court responded by sending the jurors back to the jury room with only the most cursory instruction:

> THE COURT: Ladies and gentlemen, it is apparent from the answer that the verdict of the jury is not unanimous. Under the circumstances, I request that the jury resume their deliberations. (640a)

This clearly perfunctory instruction did not advise the jury that in their subsequent deliberations they were not bound to their original verdict, nor did it inform them that the purpose of the subsequent deliberations was not limited to the goal of convincing Melnick to change her "no" vote. Although proper instructions should have perhaps been given by the court *sua sponte*, and although counsel should have perhaps called the need for such instructions to the court's attention, no such instructions were given. The fact, however, that they were not given at that moment is understandable in light of the event immediately following the instruction to the jury to return to the deliberation room and resume deliberations.

For as the jurors filed out of the jury box, and passed the court's bench on their way out of the courtroom, juror Melnick stopped and tried to speak to the court before she was required to return to the deliberation room. When this woman sought to communicate with the court, however, the court held up its hand and indicated she was to say nothing and should return to the jury room.*

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* There can be no doubt that forcing Melnick to return immediately to the jury room was to put her in a *highly pressurized and potentially coercive atmosphere*. This Court must remember that the verdict was returned on a Friday night at 7:20, that the jurors had been locked up in a hotel away from their families for the previous *five days* and that they had not eaten since lunch. Thus, Melnick clearly became an obstacle to her fellow jurors' understandable desire to get home that Friday night. (*See* comments of defense counsel Flood at 852a-853a)

Following the rebuff of Melnick, the judge set forth on the record her attempt to communicate with him:

> THE COURT: Let me ask something. Mr. Hayden mentioned this, and I want to put it on the record immediately. As the jurors were filing out Mrs. Melnick turned to me and said she wanted to say something. I held my hand up to her because I certainly didn't want her to blurt something out.
>
> She obviously wishes to communicate with the court in some way. I look to you for assistance. (643a)

Counsel responded that the court should permit the juror to speak to the judge promptly:

> MR. HAYDEN: I'd like it done immediately and I would like it on the record in private. Immediately, because if there is a coercion situation, and if we do have a dictatorial foreperson, et cetera, I do not want there to be too much time elapsed before this woman gets to the court. (643a)

After another attorney stated his impression that the jurors in general "were not in agreement with their foreman" (644a), the court itself concluded that it had sufficient reason to at least communicate with the juror "immediately" to see if, in fact, she wanted to speak with the judge. (644a) The government objected (645a), prompting defense counsel to label the government's posture as a "filibuster" designed to delay or even prevent the court from finding out what the juror wanted to say. (645a-646a) The government's response was to suggest that the deliberations be adjourned for the night. The government also stated that there might be a necessity to conduct a repoll on individual counts and individual defendants:

> MR. PLAISTED: We had enough of the outbursts in the courtroom, really. She gave a "no" answer. It is unclear as to whether she was answering as to each defendant, each count or whatever.
>
> Obviously, at some point if the jury cannot agree on the verdict we should be asking her which counts,

which defendants she is referring to and poll her specifically as to those matters. (641a-642a)

Again, Mr. Hayden emphasized that there was *imminent danger* that while the government filibustered about the propriety of this interview, juror Melnick might be subject to intimidation. (647a) Mr. Anolik further indicated that the juror might think the court's refusal to talk to her was an indication that the court disagreed with her "no" verdict. (647a) The court then wrote out a note asking whether Melnick wished to communicate with the court. (648a) At that moment, however, a note was received from the jury that read: "May we continue polling the jury?" (648a)

Defense counsel urged the court to speak with Melnick before taking any action on a poll. (649a) Not only did the court refuse this request, but it also ruled that it was not going to "continue" the poll as requested by the jury. Instead, it was going to conduct a new poll beginning with juror number one, rather than "continuing" the prior poll, which would have meant the poll would have started with juror number five. (649a). All defense counsel objected to this decision; the court nonetheless conducted the new poll "over counsel's objection" (650a-651a)

In response to this new poll, which ostensibly was being taken as a reaffirmation of the earlier announced verdict, since *no "new" verdict was ever announced after the jury resumed its deliberations*, each juror replied "yes." However, as described below, although jurors Melnick and Steidl orally said "yes," they made physical gesticulations that suggested they did not freely assent to the verdict as announced. (652a-653a) Then, as soon as the last juror said "yes", and before defense counsel could pose any requests or objections, the court immediately directed that "[j]udgment shall be entered in accordance with the verdict of the jury and the verdict sheet shall be filed with the Clerk." (653a) Defense counsel then asked that the jury not be released, so as to permit counsel to make "appropriate applications." (653a) The jury then returned to the jury room. (654a)

Once again, the focus of counsel's attention was on the extraordinary events of the evening. Mr. Baime asserted that in

his opinion the "yes" responses of Melnick and Steidl to the so-called second verdict were not true reflections of their free will:

> MR. BAIME: Judge, I noticed during the whole polling of the jury that—and I think the record should reflect, because there's really no way Mr. Sokol could reflect it on the written record other than by description, but Juror Number Four, Mrs. Melnick, although she answered "yes" *put her hands in the air and shrugged and was crying and shook her head and said "yes"* in a tone of resignation which I really did not have the impression represented her free will.
>
> I think the record should also reflect that Mrs. Steidl [the juror who had earlier complained of improper coercion] was unable to rise to answer the Court's polling questions, remained seated and was crying and merely *sobbed* out "*yes.*" Also, I think it was not a true reflection of her free will choice. (654a-655a)

Counsel again asked that the court interview Melnick immediately:

> MR. ANOLIK: . . . I would ask that Mrs. Melnick be called in. She requested to speak to your Honor. I think we have a right to have her interviewed in the presence of counsel.

When counsel requested that the judge find out what Melnick wanted to say to the court after her "no" vote, they expressly recognized that it would be improper for Melnick to disclose the nature of the deliberations; they also expressly noted that she might have wanted to say something else. (661a-662a) The court's response, however, was to presuppose what Melnick had wanted to say although the court had absolutely no factual support for its conclusion. (633a)

> I understand defendants' position, I don't think they have any right, she wants to see me for one reason, and that's to explain her vote, I don't have any right to inquire. (664a)

Mr. Baime then strongly reiterated his position that regardless of what Melnick wanted to say to the court, he wanted her questioned immediately to clarify whether *her "yes" vote* to the second poll was actually intended to express that she freely assented to the verdict. (666a)

Mr. Anolik agreed. After pointing out that the Court's choice to repoll the jury rather than to continue the initial poll, as requested, placed Melnick in a coercive atmosphere, Mr. Anolik then requested that Melnick be asked if her "yes" meant she was in agreement with the verdict or something else. (667a) Mr. Silber then re-emphasized that with respect to Melnick's earlier request to talk to the court the issue was whether Melnick had something to say that involved something other than the deliberative process. (668a)

Mr. Anolik then asked that the jury be polled on each count of the indictment. (669a) Given the enormous number of counts, the fact that no "new" verdict had ever been announced after the jury resumed its deliberations, and the ambiguity surrounding the responses of Melnick and Steidl, this request to conduct a poll on individual counts was highly reasonable, and one way of clarifying much of the uncertainty and ambiguity surrounding the verdict. Indeed, the government had made a similar request earlier, when Melnick voted "no," arguing that "[i]t is unclear as to whether she was answering as to each defendant, each count, or whatever." (641a-642a)

This time, however, when Melnick's vote was "yes," the government objected to a poll on individual counts. (669a) The court then *summarily* rejected this well-founded request for a poll on individual counts, and then called in the jury and informed it that it was discharged. (670a) Mr. Anolik then made a final plea that the jury be repolled, but the court rejected the plea and discharged the jury. (670a)

The court acknowledged, in its opinion, that juror Melnick had tried to communicate with the court before returning to the jury room and that she had cried, shrugged, waved her hands and been unable to rise when called upon in the second poll. Nonetheless, the court found that it did not err in failing to

clarify the undisputed ambiguity surrounding the meaning of Melnick's "yes," because, as a matter of law, the court stated: "*The validity of a [jury] poll should depend on what the court hears and not what it sees.*" *Musto Jury Opinion*, 540 F. Supp. at 342 (emphasis added).

> The United States Supreme Court has held that: [i]n essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . ." A fair trial in a fair tribunal is a basic requirement of due process." . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." . . . His verdict must be based upon the evidence developed at the trial. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.

Irwin v. Dowd, 366 U.S. 717, 722 (1961) (citations omitted).

This right to a verdict based solely on the *uncoerced* judgment of competent jurors is at the center of the guarantee of impartiality:

> The requirement that a jury's verdict "must be based upon the evidence developed at trial" . . . goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. "The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. *Exercise of calm and informed judgment by its members is essential to proper enforcement of law.*" Mr. Justice Holmes stated no more than a truism when he observed that "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere."

Turner v. Louisiana, 379 U.S. 466, 472 (1965) (emphasis added) (citation omitted); *see also Spain v. Rushen*, 543 F. Supp. 757, 765 (N.D. Cal. 1982).

The value placed on this right within the constitutional scheme is so substantial that, even if only one juror is improperly influenced to cast a vote in the jury's deliberations, the defendant's right to an impartial jury is held to be irreparably affected, requiring a reversal of any conviction that might have resulted. *E.g.*, *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979); *United States v. Hendrix*, 549 F.2d 1225, 1227-28 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977).

Tested against these standards, the verdict in this case is fatally flawed. The simple truth about the verdict here is that it is impossible for anyone to conclude that it resulted from an "[e]xercise of calm and informed judgment" by competent jurors. To the contrary, the totality of the circumstances surrounding its return strongly supports a finding that defendants were convicted not because twelve jurors were convinced of their guilt, but rather because one or more jurors impermissibly had their will overborne in an atmosphere of coercion that was known to the court and left unremedied.

The cloud of uncertainty that taints the verdict requires the reversal of petitioners' convictions and the direction of a new trial. At a minimum, it requires an evidentiary hearing to answer finally the questions that persist as to the validity of the verdict and the competence of the jurors who returned it.

In particular, petitioners submit (1) that the trial court erred in failing to ascertain whether a juror's stated assent to the verdict was in fact demonstrative of a free and uncoerced agreement with the decision; (2) that the unexplained refusal of the court to conduct a jury poll by counts was reversible error in light of the complexity of the charges, the multiplicity of defendants and counts, and the uncertainty as to at least Melnick's response to a general poll conducted by the court; (3) that the court erred at the time of trial and thereafter in its refusal to ascertain at least the subject matter of Melnick's attempt to communicate with the court on the night of the verdict; (4) that

the trial court erred procedurally in failing to declare a mistrial when the jury poll revealed a lack of unanimity, *failing to adequately instruct the jury on the nature of its continued deliberations*, refusing to continue the original poll at the request of the jurors and entering judgment on a verdict that had been nullified; (5) that the trial court erred in its refusal to hold a hearing for the purpose of making a record on the substance of its three *ex parte* off-the-record conferences with Steidl, especially in light of events on the night of the verdict; (6) that the trial court erred in refusing to conduct an evidentiary hearing into all of the circumstances surrounding the verdict; and (7) that the totality of those circumstances, which cloud the jury's verdict in this case, cumulatively warrant reversal of petitioners' convictions and a new trial.

Failure to Verify Assent

Pandemonium followed Melnick's disagreement with the announced verdict. In the midst of this bedlam the judge gave the jury nothing more than a cursory instruction to continue deliberating and prevented Melnick from speaking to him.

While counsel and the court were still resolving the exact language of a note to be sent to Melnick asking if she really had wanted to say something to the court that did not relate to the actual jury deliberations, the jury sent a note of its own asking the court to continue the poll. Instead of proceeding with the Melnick question or continuing the poll, the court chose to conduct a new poll, on its own, over the objection of all defense counsel. In that poll, Melnick did answer "yes" when asked if she agreed with the verdict announced by the foreperson. Her actions belied that answer, however, because she "put her hands in the air and shrugged and was crying and shook her head"; she answered "in a tone of resignation which [counsel] did not have the impression represented her free will." (654a-655a) Contemporaneous news reports of the event support this description. (1244a-1247a)

Then and throughout the post-trial proceedings, counsel raised as error the trial court's refusal to take any steps whatsoever to verify that Melnick's response did in fact reflect her true judgment and her free and uncoerced agreement with the verdict. They argued that the atmosphere within the jury room was predictably coercive, that press accounts reported that there had been screaming in the jury room and that Melnick's total attitude and actions belied any free assent to the verdict.

The trial court conceded ultimately that "juror # 4 made certain gesticulations at the time she indicated her agreement with the verdict." *Musto Jury Opinion*, 540 F. Supp. at 342. It declined, however, to grant relief at the time the verdict was returned and defended that decision thereafter:

> The court cannot be required to go beyond a juror's verbal response to a poll and determine whether the juror's body language is consistent with the stated response. The judge should be able to accept a juror's response at face value. * * * *The validity of a poll should depend on what the court hears and not what it sees.*

Id. (emphasis added).

In support of this extraordinary and disturbing proposition, the trial court sought to distinguish the instant case from other cases in which some effort to verify the juror's true intent had been required. It noted that there was "an objective statement of the juror's uncertainty" in *United States v. Freedson*, 608 F.2d 739 (9th Cir. 1979) ("I voted yes [guilty] to man, but not to God"), *United States v. Edwards*, 469 F.2d 1362 (5th Cir. 1972) ("It's my verdict but I'm still in doubt"), and *United States v. McCoy*, 429 F.2d 739 (D.C.Cir. 1970) (juror answered poll, "Yes, with a question mark"). *Edwards*, however, supports the petitioners' position that the issue of free assent is so vital to the right to trial by jury that a decision cannot rest only on "the exact response extracted from the juror by the trial judge." 496 F.2d 1367. A fair and uncoerced verdict is of such importance that a judge may not blithely assume that there is no essential inconsistency between a word spoken in a volatile and coercive

atmosphere and the facial and physical gestures of the speaker. Rather the judge must consider all the attendant circumstances.

The U.S. Court of Appeals for the Third Circuit has held that "[i]n a federal criminal trial, a verdict must be unqualified and unambiguous [and] must represent the unanimous vote of the jurors." *United States v. Lee*, 532 F.2d 911, 913 (3d Cir.), *cert. denied*, 429 U.S. 838 (1976). It has also insisted that "each individual juror must be convinced of the defendants' guilt beyond a reasonable doubt" and that no action of the court interfere with the juror's decision. *United States v. Fioravanti*, 412 F.2d 407, 419 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969). Indeed, the requirement of jury unanimity is so fundamental to the criminal justice system that it may not even be waived. *United States v. Scalzitti*, 578 F.2d 507, 512 (3d Cir. 1978).

For this fundamental protection to have any meaning at all, it must be incumbent upon the trial court to ensure that a verdict is in fact unanimous. The primary means of ensuring that the jury is unanimous is the jury poll, one object of which is to ensure that " *'no juror has been coerced or induced to agree to a verdict to which he has not fully assented.' Miranda v. United States*, 255 F.2d 9, 16, 17 (1st Cir. 1958). (Emphasis added)." *United States v. Grosso*, 358 F.2d 154, 160 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968). *Accord, United States v. Morris*, 612 F.2d 483, 489-90 (10th Cir. 1979); *United States v. Mathis*, 535 F.2d 1303, 1307 (D.C. Cir. 1976); *United States v. Sexton*, 456 F.2d 961, 966 (5th Cir. 1972); *Posey v. United States*, 416 F.2d 545, 554 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

Yet confronted with the extraordinary events and admittedly inconsistent physical and verbal reactions of a juror in this case, the trial court took no action at all to guarantee that Melnick's stated "yes" was in fact free assent. *The tragedy is that it would have been so simple for the court to act.* Indeed, as in *United States v. Freedson, supra*, 608 F.2d at 741, the court could have called all of the jurors (or at least Melnick) into chambers one by one to ask them, in the privacy and calm of that environment, to repeat their votes.

It is no answer to petitioners' concerns to suggest that a court is ill-equipped to evaluate a juror's "posture, body movements, and other gestures." *Musto Jury Opinion*, 540 F. Supp. at 342. Petitioners do not suggest for a moment that a court should attempt to engage in such fact-finding or even to interpret such gesticulations. To the contrary, petitioners rely only upon what must be the rule: that a court confronted with an obviously distraught juror casting inconsistent votes in an atmosphere fraught with the potential for coercion may not close its eyes to physical evidence that free assent may be absent. In such circumstances, judicial inquiry is required whenever a non-frivolous allegation of juror uncertainty is raised. Thus, when counsel called the court's attention to the uncertainty and ambiguity created by Melnick's response the court had to inquire further, and this clear and indisputable judicial obligation to clarify the cloud over the vedict could not and cannot be avoided by pronouncing a new rule of law requiring federal judges to ignore what they see.

The trial court had a duty on the night of Friday, March 26, 1982 to refuse to enter judgment until all questions as to the unaminity of the jury had been resolved. Having failed to meet that duty, the trial court committed error of constitutional magnitude. The only remedy available now is the reversal of petitioners' convictions and a new trial. Nothing less will satisfy the letter and the spirit of the sixth amendment.

Failure of Poll Individually

The trial court's inexplicable refusal to poll the jurors on individual counts is yet another error of constitutional proportions for which there is no remedy save reversal. By this extraordinary refusal in a complex, 46-count, eight defendant case, the trial court actively prevented petitioners from utilizing the simplest and most forthright means of testing both the voluntariness and meaning of Melnick's "yes" vote. The court's summary rejection of this request for a poll on individual counts is, like its refusal to inquire of Melnick, totally unsupportable.

The right to a poll of the jury is set forth in Fed. R. Crim. P. 31(d): "[w]hen a verdict is returned and before it is recorded the jury *shall* be polled at the request of any party or upon the Court's own motion" (emphasis added). Although appearing in a rule,

> [t]he right of the defendant to have the jury polled, as thus recognized and established by Rule 31(d), is of ancient origin and of basic importance. The object is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

Miranda v. United States, 255 F.2d 9, 17 (1st Cir. 1958) (collecting cases); *accord*, *Frady v. United States*, 348 F.2d 84 (D.C.Cir.), *cert. denied*, 382 U.S. 909 (1965) *(en banc)*, *quoting State v. Vaszorich*, 13 N.J. 99, 126, *cert. denied*, 346 U.S. 900 (1953) (Brennan, J.).

The rule does not specify the method the court must use inconducting the poll. Case law, however, clearly establishes that the poll must be conducted in a fashion that will in fact ensure that the verdict is unanimous and free of coercive corruption. *See, e.g., United States v. Farries*, 328 F. Supp. 1034, 1043 (M.D.Pa. 1971), *aff'd*, 459 F.2d 1057 (3d Cir.), *cert. denied*, 409 U.S. 888 (1972) (approving a poll in which assent was sought from "*each* juror on *each* of the 17 counts" [emphasis in original] on the grounds that the form of poll used must satisfy the purpose of the rule).

Even ignoring the doubts concerning Melnick and Steidl's true decision, this case is so complex and involves so many defendants that the need for a poll of the jury as to each defendant and/or each individual count was obvious. The polling method required in such a complex case was explicated by the District of Columbia Circuit Court of Appeals:

> The purpose of the poll is to test the uncoerced unanimity of the verdict by requiring "each juror to answer for himself, thus creating individual responsibility, *eliminating any uncertainty* as to the verdict announced by the foreman." . . . Since jury polls are a matter where "the need for clarity is at its zenith," . . . the court should shape the form of the poll so as to minimize possible confusion by the jurors. We suggested in *Williams [v. United States*, 419 F.2d 740, 747 (1969) *(en banc)]* that "archaic and confusing langauge" should be avoided in polling the jury . . . Ambiguous or misleading forms should be avoided as well.
>
> [A single poll for multiple defendants] may entail risks of confusion, especially in complicated cases. If the same verdict is reached for all defendants, there is a possibility that a single poll would fail to uncover situations where the jury convicted all defendants although only persuaded beyond a reasonable doubt of the guilt of some. Where different verdicts are reached as to various defendants, a single poll could hide a juror's confusion over which defendants he intended to acquit. Separate polls for each of several defendants, would not necessarily cure these evils. But they would focus the attention of the jurors on their verdict as to each individual defendant, and thus provide a better mechanism for uncovering jurors' possible difficulties in differentiating between defendants. [n.1: The various counts of an indictment, like multiple defendants in a trial, are also susceptible to jury problems of differentiation.] It may be preferable, as a prophylactic measure to minimize the dangers of confusion and avoid the possiblity of error, to grant requests for separate polls.

United States v. Mathis, 535 F.2d 1303, 1306 and n. 1 (D.C. Cir. 1976) (citations omitted, emphasis in original).

Numerous other cases support the need for detailed polling in this case. In *United States v. Morris*, 612 F.2d 483, 489 (10th

Cir. 1979), for example, the court spoke of the polling power as "most helpful where, for instance, the jury has been confused by multiple parties or counts." Similarly, in *United States v. Lustig*, 555 F.2d 737, 746 (9th Cir. 1977), *cert. denied*, 434 U.S. 926 (1978), the court indicated that it would be reversible error to refuse to poll the jury on individual counts if uncertainty as to the vote had been expressed. Also instructive is *United States v. Freedson*, 608 F.2d 739 (9th Cir. 1979), which involved a situation factually analogous to this case. During an initial poll, it became clear that the jurors were not unanimous. They were sent back to deliberate further and, shortly thereafter, returned a second verdict. The Ninth Circuit approvingly described the trial court's course of action.

> "The jury returned a verdict on the third day of deliberations. The judge who took the verdict ordered a poll. The fourth juror polled responded, weeping, "I voted yes [i.e., guilty] to man but not to God" and that she "wished to say not guilty." The judge halted the poll and, *after a careful charge*, sent the jury back for further deliberations . . .
>
> After an additional hour of deliberation, the jury returned a second guilty verdict. *The trial judge agreed to and did poll each juror separately in chambers* . . . [E]ach juror, including the previously undecided juror, told the judge *in the privacy of chambers* that he agreed with the guilty vote."

608 F.2d at 741 (emphasis added).

The trial court's reliance upon *United States v. Shepherd*, then, to support its finding of a waiver, is entirely misplaced. Although the *Shepherd* court does note the need to make the poll request in a timely fashion, it expressly recognizes that "*[t]he trial judge must allow adequate time for the request.*" 576 F.2d at 724 n.3 (emphasis added). All other authority in this area dictates the same result. *E.g.*, *United States v. Morris*, *supra*, 612 F.2d at 490-91; *Miranda v. United States*, *supra*, 255 F.2d at 18; Fed. R. Crim. P. 51 ("if a party has no opportunity

to object to a ruling or order, the absence of an objection does not thereafter prejudice him").

Both as a matter of fact, then, and as a matter of law, the trial court erred in denying defendants' request for a particularized poll and in denying their motion for a new trial. There was absolutely no legally cognizable reason for refusing the poll; indeed, the only possible reason not to poll the jurors individually would have been a fear that the verdict would not stand. As understandable as that fear might be, it cannot be permitted to interfere with petitioners' rights. In this case, "the need for clarity [was] at [its] zenith" when the jury was polled. *Williams v. United States*, 419 F.2d 740, 747 (D.C. Cir. 1969) *(en banc)*, *cert. denied*, 409 U.S. 872 (1972). The court's unexplained refusal to conduct a particularized poll ensured that that need would not be met. If this conviction is permitted to stand, petitioners will be forever in doubt as to whether there was, in fact, a unanimous verdict as to all counts and all defendants. Just as the trial court cannot excuse its refusal to determine if Melnick freely assented by pronouncing a new rule allowing judges to close their eyes, it similarly cannot excuse its refusal to poll on individual count on the basis of a waiver that is not in the record.

The unjustified denial of defendants' timely demand for a particularized poll is reversible error. *United States v. Shepherd*, *supra*, 576 F.2d at 724.

POINT III

WHEN THE COURT WAS FACED WITH JUROR NO. 9's HYSTERICAL PROCLAMATION AND INSISTENCE THAT SHE COULD NOT FURTHER DELIBERATE, A FACT SHE REAFFIRMED TWICE DURING CLANDESTINE INTERVIEWS WITH THE TRIAL JUDGE, THE COURT WAS OBLIGED TO DECLARE HER INCAPACITATED AND FOLLOW THE APPROPRIATE RULES DEALING WITH SUCH SITUATIONS (SEE RULE 23 (b) AND 24(c), FEDERAL RULES OF CRIMINAL PROCEDURE).

There is a dispute among the Circuits as to whether a juror who has become incapacitated to sit while deliberating can be replaced by an alternate.

The Eleventh Circuit, in *United States v. Kopituk*, 690 F.2d 1289, [1982], application for certiorari pending, is in direct conflict with the Ninth Circuit's decision in *United States v. Lamb*, 529 F.2d 1153 (1975). See also *United States v. Phillips*, 664 F.2d 971, [5 Cir. 1981], cert. den. 102 S.Ct. 2965, and 103 S.Ct. 208 [1982].

The plain language of Rules 23(b) and 24(c) foreclosed the Trial Court from replacing a regular juror with an alternate after deliberations began. The only procedure available for continuing to verdict at that point was that provided by Rule 23(b), which allows for a verdict by a jury of less than twelve provided that the parties so stipulate in writing and the court gives its approval.

> JURY OF LESS THAN TWELVE. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Fed. R. Crim. P.23(b)

In the absence of such a stipulation, the Court had no alternative but to declare a mistrial. The unambiguous directive of Rule 24(b) required the trial court to discharge the alternates after the jury retired to deliberate.

> An alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict.

Fed. R. Crim. P.24(c) (emphasis added). Thus, under the Rules, once the jury retires the alternates' function is concluded. To substitute a discharged alternate after the deliberations have begun is to inject a stranger into the proceedings and to render the verdict invalid.

The District Court in the case at bar never even considered Rules 23(b) and 24(c) F.R.Cr.P., although obviously the situation arose where that procedure became imperative. Since the mistrial was requested, we maintain the Court should have declared the mistrial.

This is another aspect of error by the District Court.

POINT IV

THE MOST DAMAGING EVIDENCE AGAINST PETITIONER WILLIAM V. MUSTO WAS A SINGLE TAPE RECORDING OBTAINED BY THE INFORMER, RUDOLPH ORLANDINI. SINCE THE THRUST AND INTERPRETATION AND CIRCUMSTANCES OF THAT RECORDING WERE SEVERELY IMPUGNED AND CHALLENGED BY PETITIONER MUSTO, IT WAS ESSENTIAL THAT THOROUGH CROSS-EXAMINATION OF THAT ISSUE BE PERMITTED. THE TRIAL COURT, HOWEVER, *PRECLUDED EFFECTIVE CONFRONTATION* OF ORLANDINI BY MUSTO'S LAWYER, MR. ANOLIK, WHEN IT FORBADE HIM TO INQUIRE ABOUT CERTAIN CIRCUMSTANCES OF THIS RECORDING, NOT ON THE GROUNDS OF RELEVANCY, BUT BECAUSE IT MIGHT IMPACT ADVERSELY UPON ONE OR MORE OF THE OTHER DEFENDANTS. *THIS DEPRIVED MUSTO OF AN EFFECTIVE RIGHT OF CROSS-EXAMINATION*, AND VIOLATED THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Rudolph Orlandini, who was, for all intents and purposes, the only substantive witness against Senator Musto, was an admitted liar, cheat, and perjurer, and therefore his credibility was severely undermined (17.181). The sole basis to corroborate and enhance his credibility revolved around the tape recording which he made of that conversation with equipment supplied to him by the Government. Only one of the conversations which he admittedly had with Senator Musto on that day and place was actually recorded, since Orlandini stated that a second conversation, for some strange reason, was not recorded. Orlandini's explanation was that the recording device could not be activated, but admitted that he, personally, had complete control over the equipment (17.206).

It was important, therefore, to determine whether this witness, Orlandini, manipulated switches which control the "on"

and "off" positions, or perhaps erased certain portions of the conversations, or otherwise tampered with the device.

Counsel for Musto asked the witness whether any auxiliary equipment was in use, such as transmitters, so that a comparison might be made with the recording that Orlandini claimed that he made (17.218). An objection, however, was voiced by other counsel.

After hearing other counsel, the Court instructed Musto's lawyer that he could not inquire along this line of inquiry. Counselor Anolik, who represented Senator Musto, declared:

> "My client has the same right to a fair trial as any other defendant in this case. . . . It is not your Honor's fault that my client has been placed in a trial with other defendants. . . .
>
> "If my client was on trial alone I would have no problem bringing this out, there would be no prejudice to Mr. D'Agostino, and I certainly don't want to prejudice Mr. D'Agostino at all, but I do want to help Mr. Musto. I would ask for a severance in view of that ruling." (17.224)

The Court denied the motion for a severance.

We submit that this ruling deprived petitioner Musto of a fair trial and of an effective right of confrontation, and, indeed, invaded and undermined his right to the effective assistance of counsel.

In any adversary proceeding, litigants generally have four basic rights: Public trial, cross-examination and confrontation, compulsory process, and assistance of counsel.

The right to public trial is a safeguard against mendacity and incorrectness. (*In Re Oliver*, 333 U.S. 286 (1948); 6 Wigmore, Evidence, §1834 (3d Ed., 1940); and *United States v. Coplon*, 185 F.2d 629, 639 (2 Cir. 1950)).

The right of cross-examination, "the greatest legal engine ever invented for the discovery of truth", insures that the witnesses

against appellant are subject to testing by counsel for the defense, who alone has an interest in showing them up as ill-founded or mistaken. [See *Alderman v. United States*, 394 U.S. 165; *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *Dennis v. United States*, 384 U.S. 855 (1966); and 5 Wigmore, Evidence, §1367 (3d Ed. 1940)].

It is not fanciful to argue that the petitioner, Musto, was *pro tanto* denied the assistance of counsel because of the prohibition against his lawyer cross-examining on this important subject.

This analytically is cognate to denying counsel access to his client. (See *Powell v. Alabama*, 287 U.S. 45, 57-58).

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law . . . It may be that in more than one sense it takes the place of torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence §1367, (Chadbourn Rev. 1976).

As indicated by the famous quote from Wigmore, cross-examination is fundamental in our judicial system. As stated in *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), cross-examination of a witness is a matter of right. To deny cross-examination is "to deny a substantial right and withdraw one of the safeguards essential to a fair trial". *Alford v. United States*, supra at 692. The limitation by the trial court in this matter was not to prohibit repetitious or vexatious questioning.

Obviously, the main reason to cross-examine Orlandini was to determine the accuracy of the tape recording and his own credibility and veracity. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. (*Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)).

As stated above, this was not a situation where the cross-examination of a witness had been extensive, repetitive, or protracted. Under such circumstances, the trial court has the discretion to limit or curtail cross-examination (*United States v. Pugh*, 436 F.2d 222 (1970)). This was not a situation where cross-examination would exceed the subject matter brought out on direct examination. See Rule 611(b) of the Federal Rules of Evidence.

As stated in *United States v. Caudle*, 606 F.2d 451 (1979):

> "Since the defendants did not have the opportunity to exercise the right of cross examination on this issue, the trial court's discretion to limit cross examination simply did not become operative . . . the trial court here did not give the defendants that reasonable latitude in cross examination which is essential to a fair trial". 606 F.2d 459.

The right to cross-examine is an essential and fundamental requirement of a fair criminal trial (*Barber v. Page*, 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1218 (1968)).

A denial of cross-examination without a waiver is a Constitutional error which no amount of want or lack of prejudice will cure. (*Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)). The Court is not required to find that the trial would have reached a different result if the defendant had been allowed to cross-examine. (*Davis v. Alaska*, 915 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974)). The denial of cross-examination on an issue which would have affected all of the witness' veracity and credibility was the denial of the defendant's Sixth Amendment right to confront the witness against him, and the denial of a fair trial.

In the final analysis, therefore, the only substantive evidence at all against Senator Musto was the tape recording and testimony of Rudolph Orlandini. It has been noted that Orlandini was totally discredited as a witness in his own right because of his numerous concessions about crimes which he committed, including perjury and lying. Thus, the tape recording was cru-

cial to Musto's conviction, especially in view of the fact that Orlandini admitted that he had never seen Musto receiving any money, nor did he himself ever give Musto any money—"Not even a penny".

It cannot be overemphasized how prejudicial this curtailment of cross-examination actually was.

POINT V

THE MAIN WITNESS IN THIS CASE, AND THE ONLY SUBSTANTIVE WITNESS AGAINST SENATOR MUSTO, WAS RUDOLPH ORLANDINI, WHO WAS EQUIPPED WITH ELECTRONIC RECORDING DEVICES FOR THE PURPOSE OF SURREPTITIOUSLY RECORDING CONVERSATIONS WITH THE PETITIONERS HEREIN ON VARIOUS OCCASIONS.

ONCE AND FOR ALL, WE ASK THIS COURT TO RESOLVE THE DILEMMA WHICH EXISTS BECAUSE OF THE DECISION IN *UNITED STATES* v. *WHITE*, 401 U.S. 745, 28 L.Ed.2d 453, WHICH WAS A PLURALITY OPINION OF THIS COURT, AND WHICH ALONE IS RELIED UPON BY LOWER COURTS TO AUTHORIZE PARTICIPANT MONITORING AND TAPING OF CONVERSATIONS WITHOUT COURT ORDER, UPON THE PRETEXT THAT ONE OF THE PARTICIPANTS TO THE CONVERSATION HAS CONSENTED THERETO.

The most crucial witness for the Government was the informer, Rudolph Orlandini. His credibility was severely assailed and undermined, but the Government relied upon recordings which he made of conversations which he had with the petitioners herein (only one of which was with petitioner Musto) to corroborate his credibility.

Since the opinion of this Court by a 4 to 4 split, in *United States* v. *White*, 401 U.S. 745, lower courts and agents throughout the country have assumed that they are authorized to employ electronic surveillance of any type without court order so

long as one of the participants to the conversation has consented.

White *United States v. White*, supra, appears in Volume 401 of the United States Reports, and *Katz v. United States*, 389 U.S. 347 appears to be an earlier case, in actual fact *United States v. White* is predicated upon *pre-Katz* law, because the operative facts in *White* occurred prior to the *Katz* opinion.

We submit that this Court should at least take this opportunity to resolve this dilemma by making it crystal-clear that *White* was decided prior to *Katz v. United States*, supra, and as such, is not a precedent for gross violations of the Fourth Amendment and the destruction of a person's reasonable expectation of privacy.

It is respectfully contended that *White* was a plurality opinion of the Supreme Court of the United States and was decided prior to *Katz v. United States*, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of *On Lee v. United States*, 343 U.S. 747 and *Lopez v. United States*, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of *Katz v. United States*, 389 U.S. 347, and we maintain should therefore be abolished. [See *Holmes v. Burr*, 486 F.2d 55 (9 Cir. 1973), cert. denied, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in *United States v. White*, supra, mentioned the fact that it did not apply since this was pre-*Katz* eavesdropping. (See *Olmstead v. United States*, 277 U.S. 438).

Justice Black cast the swing vote in *United States v. White*, and his concurrence in the judgment of the court was for the reason set forth in his dissent in *Katz v. United States*, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in *Linkletter v. Walker*, 381 U.S. 618". In *Linkletter*, Mr. Justice Black maintained that *Mapp v. Ohio*, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in *United States v. White*, Justice Black reasserted the position which he had taken in *Katz*, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In *Katz v. United States*, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of *Katz v. United States*.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, gestures, and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless, electronic intrusions as ef-

> fectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" (Dissent of Hufstedler, J. in *Holmes v. Burr*, supra).

The dissenting opinion in *Holmes v. Burr*, supra, went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. . . ."

The holding of *Olmstead* was finally overruled in *Katz v. United States*. There the court explained:

> "The Fourth Amendment protects people, not places."

Tucked into *Olmstead* was a passing reference to the theory that persons subject to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of the risk fictions relied on in *On Lee v. United States*, supra, 343 U.S 753-54 and *Lopez v. United States*, supra, 373 U.S. at 439. In *Lopez*, the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in *United States v. White*.

Using familiar jurisprudential tools, *Holmes* can be successfully distinguished from every Supreme Court decision directly bearing on the case other than *Katz*. Thus, *On Lee* and *Lopez*

not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by *Silverman v. United States*, 365 U.S. 505 (1961); *Osborn v. United States*, 385 U.S. 323; and *Berger v. New York*, 388 U.S. 41 and destroyed by *Katz Rathburn v. United States*, 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. §605). *Schwartz V. Texas*, 344 U.S. 199 (1952), involved facts similar to *Rathburn*, but the decision was based on the pre-MAPP authority refusing to apply the exclusionary rule to state courts. *Schwartz* was overturned by *Lee v. Florida*, 392 U.S. 378 (1968), a post-MAPP case, holding inadmissible under Section 605 telephone conversations overheard on a party line and not recorded. *Lewis v. United States*, 385 U.S. 206 (1966) and *Hoffa v. United States*, 385 U.S. 293 (1966), like *Holmes*, concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in *White* were closer to those in *On Lee* than to *Olmstead* or *Holmes*. But of much greater significance, *White* necessarily applied pre-*Katz* law because the electronic surveillance of *White* occurred before *Katz* was decided, and *Katz* had been earlier held nonretroactive in *Desist v. United States*, 395 U.S. 244 (1969). *United States v. White*, is nevertheless important because it reveals continuing reliance by some of the justices on the assumption of the risk doctrine. [See *United States v. White*, at 754 of 401 U.S. (White, J.)].

Although the holding in *White* was based upon the nonretroactivity of *Katz*, several of the justices did express views on the effect of *Katz* on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggested that *On Lee* remained sound law. Justices Brennan, Douglas, Harlan and Marshall each wrote separate opinions arguing that the result in *On Lee* could not survive *Katz*. Mr. Justice Black, concurring in the judgment of the court, did not address this issue, merely reasserting the position taken in his *Katz* dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate the risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

Justice Harlan, in his dissenting opinion in *White*, 401 U.S. at 787-89, aptly observed:

> "Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third party bugging a prevalent practice, it might well smother that spontaneity—reflected and frivolous, impetuous, sacreligious and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring or private discourse limited only by the need to locate a willing assistant." [Cf. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 and *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. (1942)].

See also, *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816.

If *Barlow's*, supra, stands for the proposition that expectations of informational privacy must be considered vis-a-vis the government the planted spy becomes a ready subject of Fourth Amendment interest. Once informational privacy is recognized as an appropriate Fourth Amendment interest, and once this interest is defined vis-a-vis government, the voluntary disclosure rationale breaks down. By talking to a confidante, the defendant in *White* no more consented to governmental information gathering than did the defendant in BARLOW'S who permitted employees to observe his premises. (*Stoner v. California*, 376 U.S 483, 489-90).

Indeed, if all else fails, the spy hypothetical should make the point. From the view of informational privacy interests against government, one would have a heavy burden explaining why the Fourth Amendment addresses the inspector's attempt to enter at the front door to gather evidence and yet stands oblivious to the Government's undercover entry in the rear for the same purpose. (See Amsterdam, "Perspectives on the Fourth Amendment", 58 Minn. L.Rev. 349, 365, where the author asserted:

> "I can conceive of no rational system of concerns and values that restricts the government's power to rifle my drawers or tap my telephone but not its powers to infiltrate my home or my life with a legion of spys."

In fact, Amsterdam suggested that the Government's use of spys may be more intrusive than its use of third party electronic surveillance. Id. at 407-409.

In the conclusion of her dissenting opinion, Judge Hufstedler, in *Holmes v. Burr*, supra, set forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 486 F.2d 55, 58, the dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. At-

> tacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

See *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, and *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820.

POINT VI

ALL THE PETITIONERS WERE PREJUDICED BY THE COURT'S RULING LIMITING THE SCOPE OF DR. SHUY'S EXPERT TESTIMONY CONCERNING THE INTERPRETATION TO BE PLACED UPON THE TAPE RECORDED CONVERSATIONS BETWEEN ORLANDINI AND THE PETITIONERS AND DEFENDANTS.

Much of the testimony of Orlandini, over the 25 days that he spent on the stand, included the playing of approximately ten (10) hours of surreptitiously tape-recorded conversations (280A, 10.144-29).

Prosecutor Friedman conceded that "The tapes . . . are probably the most important single aspect of this case" (381A), and that "One of the key items, as everybody I think is willing to admit in this case, is obviously the tapes" (372A).

In fact, in summation, the prosecutor concluded his summation with the following statement:

> "W.C. Fields in his own inimitable way was summing up about a case where there was recorded conversations and he said, 'Well, who do you believe, my

> client, or that lying tape?' And that's the situation in this case.
>
> The tapes, the words are there. It is clear." (387a-388a)

The Court thus ruled that Dr. Shuy would be permitted to give a lecture to the jury about linguistic methodology, but would be barred from applying his expertise as a linguistic analyst to the actual tapes.

Of course, Dr. Shuy's opinion testimony would have been relevant to the question of the intent of the parties, in that he would have testified that a linguistic analysis of the structure of the taped conversations indicated that Orlandini had a number of specific agendas aimed at getting the petitioners to make facially inculpatory statements. But such testimony, although clearly relevant to the question of intent, is certainly not equivalent to testifying as to what was, in fact, in the minds of the conversants. Rather, it is testimony to the effect that a scientific, objective linguistic analysis of the tapes supports the most critical aspect of the petitioners' defense: that Orlandini was engaged in orchestrating the taped conversations so as to falsely make the petitioners' responses appear inculpatory.

Furthermore, although the petitioners strenuously object to the characterization of Dr. Shuy's testimony as being equivalent to testimony of the conversants' intent, even if it is so characterized and even if the issue of intent is seen as being equivalent to an ultimate issue in the case, such testimony would still be admissible:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed. R. Evid. 704.

Indeed, a review of the case law shows that courts have repeatedly permitted *government* experts to give testimony analogous to Dr. Shuy's where such testimony is of critical

importance to the government's ability to establish the petitioners' guilt. For example, in *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979), the government's primary evidence against a defendant charged with illegal involvement in a gambling ring consisted of tape recordings between the defendant and other alleged gamblers. To support its argument that the tapes established that the defendant was a member of the gambling ring, the government had an FBI agent "qualif[y] as an expert in gambling and testif[y] about the nature of gambling operations, gambling terminology, and his opinion as to the [defendants] role in [the] bookmaking operation." 593 F.2d at 840. On appeal the Court rejected the defendant's argument that although it was permissible to have the expert explain gambling terminology, it was improper to have him testify based upon his objective analysis of the tape recording, that the defendant did in fact play a role in the illegal gambling ring. *Accord, United States v. Rotchford*, 575 F.2d 166, 171-172 (8th Cir. 1978) (permissible for government expert to listen to tapes and then testify that tapes show that defendant was a member of the conspiracy); *United States v. Barletta*, 565 F.2d 985, 992 (8th Cir. 1977) ("[T]he FBI [agent] qualified as an expert on the ways and language of bookmakers and expressed the opinion based on the [taped conversations] that [the defendant] was a high ranking member of the 'organization' or 'outfit'. That testimony was admissible in the discretion of the district court"); *United States v. Alfonso*, 552 F.2d 605 (5th Cir.), *cert. denied*, 434 U.S. 857 (1977) ("By reason of the cryptic nature of the recorded conversations, often framed in jargon peculiar to the gambling trade, it was appropriate [for the government] to present expert testimony to supply meaning of the conversations and *explain the roles of the defendants*") (emphasis added).

There is simply no material distinction between the expert testimony permitted in the above cases and the testimony Dr. Shuy was precluded from rendering. In the gambling cases the government expert, like Dr. Shuy, would (1) objectively listen to the tapes, (2) explain his particular analytic expertise to the jury (gambling jargon in one case, linguistic analysis in another), (3) apply his particular methodology to the tapes in question and

(4) give his opinion as to what an objective analysis indicated the defendants' role in the crime charged had been. In this case, however, Dr. Shuy was only permitted to engage in steps one and two and was precluded from engaging in the highly important application of his expert methodology to the tapes.

The erroneous nature of this trial court's ruling can best be seen by comparing this case to a more usual case in which expert testimony is presented. In a civil lawsuit following a motor vehicle accident, the trial court would certainly have permitted a specialist in accident reconstruction to testify to the general methodology used to analyze how accidents take place and the application of that methodology to the facts of the case at issue. Indeed, in *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844-45 (3d Cir.), *cert. denied*, 454 U.S. 867 (1981), this Court specifically held that the manner of and circumstances surrounding the specific accident were "clearly within the scope of [the] expertise" of an accident reconstruction expert. Under the ruling of the trial court in this case, however, this hypothetical expert would have been permitted to testify only as to the methodology of accident reconstruction, but not as to the causation of the accident at issue. In essence, the court's ruling stripped Dr. Shuy's testimony of its critical value, and prevented the petitioners from providing the jury with valid expert testimony to support their theory of the case.

POINT VII

THE TRIAL COURT PREJUDICED THE PETITIONERS WHEN IT PERMITTED THE JURY TO USE THE TRANSCRIPTS OF THE HIGHLY CRITICAL TAPE RECORDINGS AS SUBSTANTIVE AIDS TO THEIR DELIBERATIONS.

The Court correctly instructed the jury originally that the tape recordings themselves were in evidence, and not the transcripts thereof. It emphasized that the jury must determine from the tape recordings, and not from the transcripts, what was actually said and meant.

The Court committed serious error, however, when, upon request, it sent the jurors the transcripts, rather than the tape recordings, as a result of which the jury never requested the playing of any of the tapes, but obviously used the transcripts as substantive evidence. The effect, of course, was that the defendants' strategy to structure their defense around the importance of analyzing voice tones and tenor and the linguistic principles of Dr. Shuy was rendered worthless, and the court, as predicted, completely lost control over how the transcripts were employed by the jury.

There can be no dispute (a) that the most critical aspect of the case was how the jury would interpret the tape recordings; (b) that the key defense strategy for rebutting the facially inculpatory tapes was to argue that, when the tapes were *listened* to closely, and the tone, tenor, inflection and pauses of the conversants were analyzed, they would not prove inculpatory; and (c) that by permitting the jury to review the cold transcripts without any type of supervision, while the tapes were not being played, the court completely nullified the defendants' trial strategy.

It is similarly indisputable that there was no permissible basis in law to permit the transcripts to be given to the jury as was done in this case. All of the federal courts that have addressed this issue have uniformly held that jurors should be permitted to use tape transcripts *solely* as an aid in listening to the tapes. *E.g.*, *United States v. John*, 508 F.2d 1134, 1141 (8th Cir.), *cert. denied sub nom. Lekometros v. United States*, 421 U.S. 962 (1975) (trial court should carefully instruct the jury on the limited use of the transcripts solely as aids in listening to the recordings; expressly noting with approval that "the transcripts were not made available to the jury during its deliberations"). *Accord*, *United States v. Vinson*, 606 F.2d 149, 154 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) ("The jury was carefully advised that the transcripts were only an aid and that the tapes were the substantive evidence, and only the tapes were allowed in the jury room"); *United States v. Slade*, 627 F.2d 293, 302 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980) ("a transcript is only meant to be a guide to evidence—the tape

being played"); *United States v. Rinn*, 586 F.2d 113, 117-18 (9th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) ("transcripts were provided merely to facilitate listening"); *United States v. McMillan*, 508 F.2d 101, 105-06 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States v. Phillips*, 577 F.2d 495, 501-02 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (transcripts were merely listening aids); *United States v. Nashawaty*, 571 F.2d 71, 75 (1st Cir. 1978) (transcript used only as a listening aid); *United States v. Papia*, 560 F.2d 827, 844 (7th Cir. 1977) (transcripts were for the "limited purpose of assisting the jury in following the conversations on the tapes"); *United States v. Johnson*, 363 F. Supp. 711, 713 (E.D. Pa. 1973), *aff'd mem.*, 492 F.2d 1239 (3d Cir. 1974) (use of transcripts as a listening aid); *United States v. Lawson*, 347 F. Supp. 144, 149 (E.D. Pa. 1972) (transcripts not given to jurors during deliberations).

The principle that transcripts are to be used only as an aid to the jury in listening to the tapes themselves is so well-settled that it is reflected in the pattern jury instructions widely used in the federal system. In 1 Devitt & Blackmar, *Federal Jury Practice and Instructions* §15.28 (3d ed. 1978), the following language is suggested: "Transcripts are being furnished for your guidance *as you listen to the tapes* . . . The tapes, however, are evidence in the case and the transcripts are not evidence." (Emphasis added.) Indeed, when the first tape in this case was played for the jury, the court followed the standard instruction and instructed the jury that the transcripts were to be used only as a listening aid. (T10.220-.21)

Nonetheless, after setting the ground rule early in the trial that the transcripts were only to be used as listening aids, and after the defendants had structured a significant part of their defense around the argument that if one listened to the tapes, as opposed to reading the transcripts, the tapes would be viewed as non-inculpatory, the court erroneously submitted the transcripts to the jury without any limitation on their use. Further, and most astonishing, although the court's supposed rationale for sending the transcripts in was to assist the jury in locating conversations to be played, the court never even instructed the jury as to this time saving function, much less instructed the

jury that this was the only purpose for which the tapes should be used. Because the court's handling of this entire matter was not merely erroneous but fatally prejudicial in that it utterly destroyed a material aspect of the defendants' trial strategy, it warrants a reversal of the convictions and a new trial.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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* The appropriate standard of review for this issue is legal error, in that the case law expressly holds that as a matter of law transcripts should only be used as a listening aid. Further, even assuming *arguendo* the court had discretionary power to send in the transcripts for the limited purpose of assisting the jury in locating desired conversations, as the court never even instructed the jury of this limited function the ruling constitutes a clear abuse of discretion.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5290, 82-5297/98
82-5304/5/6/7, 82-5511/12

UNITED STATES OF AMERICA

v.

AIMONE, GILDO,
Appellant in No. 82-5290

UNITED STATES OF AMERICA

v.

DENTICO, LAWRENCE,
Appellant in Nos. 82-5297 and 82-5511

UNITED STATES OF AMERICA

v.

D'AGOSTINO, DOMINICK,
Appellant in Nos. 82-5298 and 82-5512

UNITED STATES OF AMERICA

v.

MUSTO, WILLIAM V.,
Appellant in No. 82-5304

UNITED STATES OF AMERICA

v.

SCARAFILE, FRANK,
Appellant in No. 82-5305

UNITED STATES OF AMERICA

v.

POWERS, JOHN J.,
Appellant in No. 82-5306

2

UNITED STATES OF AMERICA

v.

GENOVESE, ANTHONY,
Appellant in No. 82-5307

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Crim. Nos. 81-144-01/02/03/05/06/07/08)

Argued May 11, 1983

Before: ADAMS and WEIS, *Circuit Judges* and
VANARTSDALEN, *District Judge**

(Opinion filed August 25, 1983)

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*The Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

Defendants in these consolidated appeals were found guilty of violating the Racketeer Influenced and Corrupt Organizations Act. They contend there was dis-

crimination in the selection of grand jury forepersons and a variance between the conspiracy charged and the evidence at trial. They also challenge the verdict because the trial judge interviewed a juror during deliberations at the suggestion of counsel, and another juror reaffirmed her agreement with the verdict following a recantation shortly after a spectator's emotional outburst in the courtroom. Having considered these and the defendants' other contentions, we find no reversible error and affirm.

After a twenty-one week jury trial, the seven defendants who are appellants in this case were convicted of RICO violations, conspiracy, mail fraud, and wire fraud. Four of the defendants were found guilty of income tax fraud as well. The jury also returned verdicts of not guilty on nine of the forty-six counts in the indictment. All of the appellant's post-trial motions were denied.

The evidence at trial established to the jury's satisfaction the existence of an enterprise consisting of defendants Lawrence Dentico, Dominick D'Agostino, and Thomas Principe,[1] together with the Orlando Construction Company and Rudolph Orlandini. Dentico and D'Agostino supervised and promoted the affairs of the enterprise through their control of the Orlando Construction Company and other entities formed to develop and manage construction projects in Union City and North Bergen, New Jersey. Defendant Genovese assisted the enterprise in his capacity as an architect for the Orlando Company and the related entities.

The other defendants were all public officials. Defendant William Musto was the mayor of Union City and a state senator. Frank Scarafile was the deputy chief of police in Union City and a member of the Board of Education. John Powers was the president of the Union City Board of Education. Gildo Aimone was executive director of the Union City Housing Authority, and John

1. Principe is a fugitive and has not been tried.

Bertoli[2] held a similar position in North Bergen. These public officials accepted bribes to use their offices and influence in furtherance of the enterprise's affairs. Through their assistance, the enterprise received city construction contracts, tax abatements, and payments on fraudulent work orders. The city officials also cooperated with the enterprise in its attempt to have Union City purchase an office building at a grossly inflated price.

In 1974, the Orlando Limited Partnership, one of the related entities, began development of the Bella Vista senior citizen housing project in Union City. The enterprise agreed to a $50,000 bribe and actually paid $12,000 to Scarafile so that Musto would arrange for a tax abatement and intercede with the state housing authority. Bribes were also paid to obtain similar treatment for other projects undertaken by the enterprise's related entities.

A $40,000 bribe was paid to Musto, Scarafile and Powers when the Orlando Construction Company was awarded contracts to renovate two Union City high schools in 1977. For these projects, Musto instructed the school board attorney to "bend the law a little" because some items were missing on an Orlando Company bid.

In addition, Aimone allowed the company to file a performance bond after the time originally set and arranged to have all payroll records for the project directed to him. Genovese submitted change orders for work not specified in the contracts and checks were then issued by Aimone. Aimone and Powers also authorized payments for work that was never performed and in some instances double payments were made.

Between 1974 and 1978, the enterprise group participated in a number of other public projects, for which

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2. Bertoli was found guilty by the jury, but was granted a new trial.

bribes were paid to Musto, Scarafile and Powers. Perhaps because of the size of the bribes, the enterprise was financially unable to complete some of the work. To secure additional funds, Dentico directed Orlandini to invest $300,000 in an office building. The plan was that $200,000 would then be paid to Musto, Scarafile and Powers to arrange a purchase of the building by Union City at the inflated price of $3.1 million. Public opposition to the sale, however, caused the purchase price and bribe to be reduced. Although Scarafile received a $75,000 "advance" on the bribe, the sale of the building never took place because of an adverse vote in a referendum. After the election, Orlandini, D'Agostino, Powers and Scarafile agreed that $50,000 of the advance would be returned.

In July 1980, Orlandini agreed to cooperate with the government and surreptitiously tape-recorded a number of conversations with defendants as he tried to recover the $50,000. At the trial, Orlandini spent twenty-six days on the witness stand and was extensively cross-examined by defense counsel. The government also introduced the tape recordings made by Orlandini, as well as a significant amount of documentary evidence, including fraudulent change orders, checks, and correspondence among defendants. Five defendants took the stand and presented testimony that lasted more than fourteen days. An expert on linguistics also testified for the defense in support of the defendants' theory that Orlandini had orchestrated the taped conversations so that neutral responses would appear inculpatory.

On appeal, defendants raise a variety of issues. Only three merit discussion: the selection of grand jury forepersons, the evidence of a single conspiracy, and the actions of the trial court during jury deliberations and announcement of the verdict. The defendants' other contentions are listed in the appendix.

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I

In the district court, defendants challenged the process for selecting grand and petit jurors and grand jury forepersons as being discriminatory on a variety of grounds, including race, nationality and sex. On appeal, defendants have reduced their contentions to one — the indictment should be dismissed because women were not properly represented as grand jury forepersons in the District of New Jersey.

In addressing this contention, the district court accepted the defendants' allegation that a proportionate number of women had not been appointed as forepersons over a five-year period.[3] The court concluded, however, that defendants had not established a violation because the foreperson "does not have disproportionate influence in the deliberative process," and therefore the position is constitutionally insignificant. *United States v. Musto*, 540 F.Supp. 346, 362 (D. N.J. 1982).

Fed.R.Crim.P. 6(c) provides that the court shall appoint one of the impaneled grand jurors to act as foreman and one as deputy foreman to act in his absence. The foreman administers oaths, keeps a record of the number of jurors concurring in the finding of an indictment, and signs all indictments. It has been held, however, that the absence of the foreman's endorsement is only a technical irregularity and not fatal to the indict-

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3. The district court found that of the 25 forepersons and 25 deputy forepersons selected between April 1976 and July 1981, two forepersons and three deputy forepersons were female. A prima facie statistical case was held to have been established because the percentage of women chosen was sufficiently disparate from the district's 52% female population. *United States v. Musto*, 540 F.Supp. 346, 357-59 (D. N.J. 1982). The government contends that the statistical analysis is flawed because the sample and the time period were both too small, and because the geographic area surveyed was the Newark vicinage rather than the entire district of New Jersey. In light of our resolution on this issue, we express no view on the statistical aspects of the district court's opinion.

ment. *Frisbie v. United States*, 157 U.S. 160, 163-65 (1895).

The district court concluded that these duties are "purely ministerial" and that defendants failed to show that a foreperson "has the power to alter the 'unique qualities and characters of the jury's individual members.' " 540 F.Supp. at 362 (citation omitted). The court also observed that each grand jury was selected by a process providing for fair representation of the community.

The Supreme Court has not decided whether grand jury forepersons have such a significant impact on the criminal justice system that discrimination in their selection amounts to a constitutional violation. In *Rose v. Mitchell*, 443 U.S. 545, 551-52 n.4 (1979), the Court "assume[d] without deciding that discrimination with regard to the selection of only the foreman" requires that a conviction be set aside. It found, however, that discrimination had not been established.

Rose was a state conviction case. Under Tennessee law, the trial court chose a foreman from the general population to serve as the thirteenth juror in a body otherwise composed of persons selected by a random process. A foreman served for two years and could be, and often was, reappointed. He was expected to assist the district attorney in investigating crimes, could conduct the questioning of witnesses, and had to sign an indictment for it to be valid. *See id.* at 548 n.2. It is clear that the Tennessee grand jury foreman was in a position to guide the decision-making process of the grand jury and had substantially greater power than his federal counterpart.

In *Rose* the Supreme Court assumed only for purposes of that case that the Tennessee foreman had a significant role. In *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit found, however, that a Louisiana state foreman with less power did occupy a controlling position, and in *United*

States v. Cross, ____ F.2d ____ (11th Cir. June 30, 1983) (No. 81-7783), the Court of Appeals for the Eleventh Circuit reached the same conclusion with respect to federal grand jury forepersons in the Middle District of Georgia, *see also United States v. Perez-Hernandez*, 672 F.2d 1380 (11th Cir. 1982).

A contrary view on the role of the federal foreperson was expressed in *United States v. Hobby*, 702 F.2d 466, 470-71 (4th Cir. 1983) and *United States v. Coletta*, 682 F.2d 820, 822-24 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983). *See also United States v. Holman*, 680 F.2d 1340, 1356 n.12 (11th Cir. 1982); *United States v. Perez-Hernandez*, 672 F.2d at 1388-89 (Morgan, J., concurring). In *Hobby*, the court noted the substantial differences between grand jury forepersons in Tennessee and the federal system, and concluded that the federal foreperson's "role is so little different from that of any other grand juror that the rights of the defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection." 702 F.2d at 471.

We find that the district court here made a realistic assessment of the role of the federal grand jury foreperson. In our view, the duties of the federal foreperson are only ministerial. We acknowledge the contrary conclusion in *United States v. Cross*, but point out that forepersons in the Middle District of Georgia were found to perform certain functions not exercised by forepersons in the District of New Jersey. *Compare Cross*, slip op. at 3778, *with United States v. Musto*, 540 F. Supp. at 359. The differences may be attributable to custom and practice that have developed in the respective districts. In any event, we are not persuaded that the duties performed by a federal foreperson confer the power to control the decision-making process of the grand jury.

Moreover, we regard it as extremely significant that the Tennessee foreman considered in *Rose v. Mitchell* was selected from the public at large, whereas the federal foreperson is chosen from among a randomly selected grand jury, and cannot agree with the conclusion in *Cross* that "this difference is irrelevant." *Cross*, slip op. at 3778.[4] We conclude that the selection of one member of a properly constituted grand jury to carry out the ministerial duties of foreperson does not, in the context of this case, raise constitutional concerns. Accordingly, we find no error in the district court's denial of the motion to dismiss the indictment.

II

With respect to the RICO convictions, defendants contend the government drafted an indictment that lumped together six unrelated conspiracies. They allege the prosecution sought to confuse the jury by producing massive evidence of diverse and distinct schemes. Part of the problem, they assert, is that the indictment's description of the "enterprise" as "a group of individuals and a corporation associated in fact" does not conform to the statutory definition, 18 U.S.C. §1961(4) (1976).[5]

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4. The court in *Cross* found that the Tennessee foreman "probably does not have the potential for influence on the grand jury's deliberations" because "[h]e does not participate in the grand jury voting process." *Cross*, slip op. at 3778. That finding was based on a reference in *Rose*, in connection with one of the parties arguments there, to "the nonvoting foreman of the grand jury." 443 U.S. at 560. In summarizing Tennessee law on grand juries, however, the Supreme Court stated that "[t]welve members of the grand jury must concur in order to return an indictment . . . [and] [t]he foreman or forewoman may be 1 of the 12." *Id.* at 548 n.2 (citations omitted).

5. Section 1961(4) provides:

" 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

They emphasize the statute describes two different types of enterprises — the first being certain designated legal entities; the second "any union or group of individuals associated in fact, although not a legal entity." According to defendants, an enterprise must be in one category or the other, not a combination of both.

This argument is not persuasive. It was rejected in analogous circumstances by the Court of Appeals for the Fifth Circuit in *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir.), *cert. denied sub nom., Evans v. United States*, 456 U.S. 1008 (1982). There, the enterprise was described as "a group of individuals associated in fact with various corporations." The court reasoned that Congress used the word "includes" in the enterprise definition to indicate a non-exhaustive listing of associations and that a broad interpretation was intended. Similar reasoning was applied in *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), where the court recognized that an enterprise could include more than one corporation.

We see no indication that Congress intended to restrict the definition of "enterprise" to a number of entities or individuals that all fall within the same category. The Supreme Court has stated that "[t]here is no restriction upon the associations embraced by the definition" in section 1961(4). *United States v. Turkette*, 452 U.S. 576, 580 (1980). Accordingly, we are convinced that a proper statutory enterprise was charged and proved here.

Defendants also argue that the evidence showed more than one conspiracy and thus there was a variance from the indictment. *See Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Camiel*, 689 F.2d 41 (3d Cir. 1982). After the present case was tried, this court decided *United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983), where the same issue was raised. There, we agreed with the Court of Appeals for the Fifth Circuit that " 'a series of agreements that under pre-RICO law

would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy.' " *Id.* at 224-25 (quoting *United States v. Southerland*, 656 F.2d 1181, 1192 (5th Cir. 1981), *cert. denied* 455 U.S. 949 (1982)). The " 'key element is proof that the various crimes were performed in order to assist the enterprise's involvement in corrupt endeavors.' " *United States v. Riccobene*, 709 F.2d at 224 (quoting Blakey and Goldstock, " 'On the Waterfront': RICO and Labor Racketeering," 17 Am.Crim.L.Rev. 341, 361 (1980)).

In the present case, the enterprise undertook construction projects for the enrichment of its members. To promote the projects, defendants committed bribery as well as mail and wire fraud in securing tax abatements, building contracts, public financing, and fraudulent work payments. There was, then, adequate evidence for the jury to find that each of the defendants agreed to conduct, or participate in the conduct of, the enterprise's activities through the commission of predicate offenses. The fact that the jury acquitted on some counts establishes its ability to analyze the conflicting testimony and sort out that which was relevant to specific charges. As the record supports a finding of a single enterprise conspiracy, there was no variance between the indictment and proof at trial.

III

The points pressed most strongly by defendants grow out of incidents that occurred during the jury deliberations and polling after the verdict was announced.

A.

On the morning of the third day of deliberations, the trial court received a message that Juror No. 9 was upset and crying. She had never been away from her husband in many years of marriage and was distressed at the separation imposed by the sequestered deliberations. After

court and counsel discussed the matter, it was agreed, without objection by any of the defense lawyers, that the judge would speak to the juror, alone and off the record.

After the meeting, the judge conferred with counsel and gave them a synopsis of his conversation with the juror. The judge reported that the juror was "hysterical because of the pressure of the deliberations. Apparently the foreperson had insisted that the jurors support their views and indicated that they should do so before going to dinner last night. Apparently that direction upset her very much."

After some comments from the attorneys, the judge stated that he was looking to them for guidance. A number of alternatives were suggested, but ultimately all of the defense lawyers agreed that the juror should not be excused. With the consent of all defense counsel, the judge spoke a second time with the juror, again without the presence of a court reporter.

After that discussion, the judge reported to counsel that he had told the juror that he would "have a chat with [the foreman] as to his functions." The judge also read to Juror No. 9 a portion of the charge he would consider giving to the jury as a whole. In response, the juror said she did not wish to continue under any circumstances.

Defense counsel were unable to agree on what should be done at that point, and the court adjourned for a luncheon recess. Upon returning, counsel were informed by the judge that he had met once again with the juror and told her it might be necessary for her to continue serving in the case. The judge said, "She indicated to me that she would be willing to do so."

Counsel praised the judge for his ingenuity in bringing the matter to a head and then proceeded to debate the alternatives. Several of the defense lawyers moved for mistrial, others wished to have the juror remain, and another requested a hearing. None wanted to substitute an alternate juror or to proceed with eleven jurors.

Counsel then agreed upon language to be used in a supplemental charge to the jury, and a brief voir dire of Juror No. 9 was held in chambers in the presence of counsel and on the record. At that time, the juror responded that she would continue and be impartial. The jury was then called in, given the supplemental instruction on the role of the foreperson in deliberations, and directed to continue deliberating.

Even though defense counsel had agreed during the trial that the judge could talk to the juror informally and off the record, they filed post-trial motions arguing that they had not authorized the third conference and that it should have been recorded. The district judge rejected this contention, commenting that counsel for one of the defendants "applauded the court for its 'ingenuity' " and three others joined in another defense lawyer's remark that he " 'adopt[ed] and support[ed] the procedure involved.' " *United States v. Musto*, 540 F. Supp. 318, 334 (D. N.J. 1982). Indeed, none of the defendant's trial counsel objected to the court's third meeting with the juror upon learning of it.

The district court found that *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), was not controlling. By contrast, counsel in the present case had promptly received a report of what had transpired at each meeting with Juror No. 9, and a voir dire examination of the juror had been conducted in the presence of all counsel. In addition, the court observed that the supplementary instructions to the entire jury had prevented any misapprehension that might have been conveyed by her to the other jurors. On appeal, defendants nevertheless rely on *Gypsum* in arguing that they had a right to a complete record of each meeting, rather than the judge's summaries.

In *Gypsum*, the Supreme Court commented that a private meeting between a trial judge and a juror was undesirable, but standing alone was not error. The error in that case arose when the *ex parte* discussion between

the trial judge and the jury foreman drifted into what the Supreme Court construed as a supplemental instruction on the jury's obligation to return a verdict. In addition, since counsel were not aware that the foreman might have been given the impression that a verdict had to be returned in any event, there was no opportunity to seek correction of that misapprehension.

We agree with the district court that there are substantial distinctions between this case and *Gypsum*. Here, there was a supplemental charge to the jury in open court that avoided the possibility of an instruction being transmitted by one member of the jury to the others. Counsel also had the opportunity to be present at the voir dire of the juror with whom the court met. Nor can we overlook the fact that counsel were eager to have the trial judge meet with the juror to determine the extent of the problem. Indeed, the defense lawyers were enthusiastic in their approval of the trial judge's action; only the prosecution voiced any reservations.

The *Gypsum* case emphasizes the dangers of *ex parte* communications with jurors and nothing we say here should be construed as encouraging such communications. Nevertheless, when defense lawyers, as a matter of trial strategy, urge the judge to conduct off-the-record interviews with a juror in a situation like this, we hold counsel to their obligations to the court. They may not promote action by a trial judge and then assign that compliance as error. "Sandbagging" will not be countenanced by this court. *See United States v. Pecora*, 693 F.2d 421, 425 (5th Cir. 1982), *cert. denied*, ____ U.S. ____, 51 U.S.L.W. 3883 (U.S. June 13, 1983). Nor is our position altered by the fact that different counsel are chosen to represent the parties on appeal. Trial counsel's actions in this respect are binding on the client and appellate counsel as well. *See United States v. Provenzano*, 620 F.2d 985, 997 (3d Cir. 1980), *cert. denied*, 449 U.S. 899 (1981) (noting "longstanding rule

that counsel's intentional tactical decisions at trial bind his client.").

Moreover, there is not the slightest indication in this record that the interview with Juror No. 9 in any way influenced the verdict. The conversations between the judge and juror focused on the juror's reluctance to continue and the conduct of the deliberations by the foreman. The juror's willingness to remain was established by the voir dire. The foreman's role in the deliberative process was covered fully in the supplemental instructions given by the trial judge before the jury resumed its deliberations after disposition of Juror No. 9's complaint. These instructions were carefully and exhaustively reviewed with counsel and in final form were approved by all defense lawyers.

We reject as well the defendants' contention that there should be a post-trial interrogation of the jurors about what they may have been told by Juror No. 9. In these circumstances, that would constitute an unwarranted intrusion into the jury deliberations. *See* Fed.R.Evid. 606(b) ("a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations"); *Sullivan v. Fogg*, 613 F.2d 465 (2d Cir. 1980); *King v. United States*, 576 F.2d 432 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978); *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); *Government of Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976). In sum, we find no reversible error in the trial court's disposition of the issues with respect to Juror No. 9.

B

Two days after the incident with Juror No. 9, at about 6:30 p.m., the jury asked for clarification of the evidence on one of the counts. Following consultation with counsel, the court responded to the inquiry. Shortly

afterward, the jury sent word that it had reached a verdict.

As the foreman announced the verdict of guilty on the first count in the crowded courtroom, there was "a tremendous outpouring of emotion," as the trial judge phrased it. "Mrs. Musto, the wife of one of the defendants, rose to her feet and broke into tears. As the foreman continued to read the verdict, she clutched at her husband . . . and continued to weep. Several of the female jurors, observing Mrs. Musto's reaction to the verdict, then began to cry themselves. . . . Several relatives attempted to remove Mrs. Musto from the courtroom but she reacted by tightening her embrace of her husband and by continuing to cry hysterically." 540 F. Supp. at 328.

When announcement of the verdicts on all counts had been concluded, defense counsel requested a poll. The court informed the jurors that each of them would be asked if he or she agreed with the verdict and that they should answer "yes" or "no." The first three jurors answered "yes," but Juror No. 4 said "no."

The district court's opinion describes the ensuing scene: "At this point, pandemonium broke out in the courtroom. Many supporters of the defendants who were present leapt to their feet screaming. People pounded on the benches of the courtroom and some of the defense attorneys pounded on their desks and shouted." *Id.* at 329. The trial judge then directed the jurors to resume deliberations. As the jury walked toward the exit, Juror No. 4 turned to the trial judge and said, "Your Honor." He held up his hand to stop her from saying more, and the jury left the courtroom.

The judge then met with counsel in chambers and detailed Juror No. 4's actions on the record, saying, "She obviously wishes to communicate with the court in some way. I look to [counsel] for assistance." A spirited discussion followed for several minutes. The judge then asked counsel to review a note he proposed sending to the jury,

asking whether Juror No. 4 wished to speak to the court or whether the jury wished to continue deliberations. Just as counsel reached agreement on the phrasing of the note, the court received one from the jury that read: "May we continue polling the jury?" The judge estimated that no more than 10 or 15 minutes had elapsed since the jury had left the courtroom.

One of the defense lawyers requested the judge to inquire in open court whether Juror No. 4 wished to see him. The judge refused and announced that the jury would be polled, beginning with Juror No. 1. Defense counsel objected to this sequence, contending that the polling should begin with Juror No. 5.

Before beginning the second poll, the judge cleared the courtroom of all persons other than defendants, counsel and members of the press. He then reminded the jurors that each would be asked if he or she agreed or disagreed with "the verdict as announced by your foreperson." On the poll, each juror answered "yes."

After the polling was completed, the jury returned to the deliberation room while counsel presented motions. One of the defense lawyers said that Juror No. 4, "although she answered 'yes,' put her hands in the air and shrugged and was crying and shook her head and said 'yes' in a tone of resignation which I really did not have the impression represented her free will." Other counsel asked that the judge interview Juror No. 4 in the presence of counsel, but the court declined.

In his opinion, the trial judge referred to Juror No. 4's vote and said: "The poll did not reveal the juror's uncertainty with the verdict. Although Juror No. 4 made certain gesticulations at the time she indicated her agreement with the verdict, the court cannot conclude that those gestures indicated uncertainty with the decision." 540 F. Supp. at 342.

When the jury was recalled to the courtroom to be discharged, one defense attorney asked for another poll, this one as to each count. The trial court refused and dismissed the jury.

Defendants argue on this appeal that, after Juror No. 4 answered "no", a mistrial should have been granted or, in any event, further instructions should have been given at that point. They also contend that the second poll should not have begun with Juror No. 1, and that a valid verdict was not recorded. Defendants are critical as well of the trial judge's failure to meet with Juror No. 4 before accepting the verdict and his refusal to interview her after the verdict was received. Finally, they assign error in the district court's refusal of a poll on each count.

The trial judge acted properly in requiring the jury to deliberate further after the aborted first poll. Fed.R.Crim.P. 31(d) provides that if there is not unanimous concurrence on a poll, "the jury may be directed to retire for further deliberation or may be discharged." The choice is a matter within the discretion of the trial judge, even if a motion for mistrial is made. *United States v. Warren*, 594 F.2d 1046, 1049 (5th Cir. 1979). The trial judge is in a better position than an appellate court to determine the likelihood of an ultimate unanimous verdict after a dissenting vote during a poll. His judgment, particularly after a lengthy trial such as this one, must be given proper deference. *See United States v. Smith*, 562 F.2d 619, 622 (10th Cir. 1977).

Defendants did not request additional instructions before the jury left after the first poll, and in view of the emotionally charged atmosphere in the courtroom, the trial judge properly removed the jury from the scene as quickly as possible. Any other course of action would have risked further disruption of the trial in its concluding moments and possibly tainted the verdict.

We also find no error in the trial judge's decision not to speak with Juror No. 4 once he learned that the jury wished to resume polling. An interview at that stage would have been intrusive and might well have interfered with the jury's function. Moreover, the second polling offered Juror No. 4 an opportunity to continue to

dissent, if she so chose. By clearing the courtroom of spectators, the judge provided a much calmer ambience for the second poll.

We noted earlier that interviews with individual jurors are not to be encouraged, and that is particularly so in the circumstances present here. The trial judge's prudence was proper. As we observed in *United States v. Lee*, 532 F.2d 911 (3d Cir.), *cert. denied*, 429 U.S. 838 (1976), making inquiries of jurors threatens the secrecy of deliberations and invites charges of coercion and interference with the jury's function. *See also United States v. Nelson*, 692 F.2d 83, 85 (9th Cir. 1982); *United States v. Sexton*, 456 F.2d 961, 966 (5th Cir. 1972).

Defendants next argue that Juror No. 4's gestures indicated that she did not assent to the verdict. The trial judge, however, wrote that "the court cannot conclude that these gestures indicated uncertainty with the decision." 540 F. Supp. at 342. We must rely upon the trial judge's appraisal of the circumstances.[6] It is particularly appropriate that we do so in this case where the trial was marked by the judge's scrupulous sense of fairness, his determination to observe the defendants' rights, and his continuing courtesy to counsel in difficult and exhausting circumstances.

We also reject the defendants' contention of error in beginning the second poll with Juror No. 1. The method

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6. It is unfortunate that we must rely only on the recollections of some of those who witnessed the occurrences at the end of this case. With the advent of videotape, modern technology has made it possible to have speedy, inexpensive visual and audio recording of trials. As early as 1930, Judge Jerome Frank said that sound motion pictures should be made of trials. *See* United States v. Rubenstein, 151 F.2d 915, 921 n.5 (2d Cir. 1945) (Frank, J. dissenting). *See also* J. Frank, COURTS ON TRIAL 224 (Princeton Univ. Press 1945). Yet today when vastly improved methods are available, the courts must still depend on the techniques that were used a hundred years ago. *See* United States ex rel. Perry v. Mulligan, 544 F.2d 674, 679 n.3 (3d Cir. 1976).

of polling is entrusted to the discretion of the trial court. *See United States v. Shepherd*, 576 F.2d 719, 722 n.1 (7th Cir.), *cert. denied*, 439 U.S. 852 (1978). There has been no demonstration of a misuse of that discretion here. Moreover, we have held it to be error for a trial judge to inquire into the numerical division of the jury when informed that a jury has been unable to reach a decision. *Government of Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979); *see Brasfield v. United States*, 272 U.S. 448 (1926). Had the trial judge continued the first poll after Juror No. 4 dissented, the numerical division of the jury would have been revealed. Once a juror has dissented from the verdict, there is no need for further polling and to continue the process without the opportunity for further deliberation is erroneous. *See United States v. Spitz*, 696 F.2d 916 (11th Cir. 1983) (per se error to continue polling).

The repolling in this instance obviously had to begin with Juror No. 1. A poll that omitted Juror No. 4 and left her dissent as a position of record would have impermissibly revealed the numerical division of the jury. The trial judge properly began the process anew.

We find no merit as well in the defendants' argument that the trial court erred in refusing their request for a poll on each count after the verdict was recorded. As we observed before, the manner in which a poll is conducted is within the discretion of the trial court. Moreover, "the power to repoll is also among the judge's discretionary powers." *United States v. Morris*, 612 F.2d 483, 489 (10th Cir. 1979). Defendants have shown no abuse of discretion here. *See United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978).

We also reject the defendant's contention that the district court should have held a post-verdict hearing on what Juror No. 4 wished to communicate to the court as she left the courtroom after the initial poll. As noted earlier, post-verdict inquiries of jurors are strongly dis-

favored and severely restricted. "This is to avoid harassment of jurors, inhibition of deliberation in the jury room, a deluge of post-verdict applications mostly without real merit, and an increase in opportunities for jury tampering; it is also to prevent jury verdicts from being made more uncertain." *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978). Defendants have not produced any grounds adequate to justify deviation in this case from the settled policy.

Finally, the defendants argue that because the jury's findings were not reannounced before the second polling began, there is no valid verdict. No objection to this effect was made at the trial, and it is too late now to raise such a technical point. If defendants had a genuine concern about the problem, then they should have presented it to the trial judge when correction could easily have been accomplished. In any event, we are confident that the jurors knew precisely what they were doing when the trial judge began the second poll by directing their attention to the verdict that had previously been announced.

Accordingly, the judgments of the district court will be affirmed in all respects.

APPENDIX

Listing contentions raised and rejected but not discussed in opinion.

A. Contentions of all defendants:

1. The district court erred in limiting the testimony of an expert witness to a general discussion on the linguistic analysis of conversations and in not allowing him to apply that analysis to the specific tape recorded conversations introduced in this case.

2. The district court erred in permitting the jury to use transcripts of tape recordings during deliberations.

3. Reversal is required on the basis of cumulative error.

4. The law and facts of the case were too complex for the jury to render individualized and rational decisions.

B. Contentions raised by defendants Dentico and D'Agostino and joined in by defendant Aimone:

1. The district court abused its discretion in failing to sever any of the defendants or counts.

2. The district court erred in its handling of a post-trial hearing on, and in refusing to set aside the verdict on the basis of, an alleged social relationship between one of the jurors and the government's main witness.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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ORDER OF AFFIRMANCE OF JUDGMENT
OF THE DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-5290, 82-5297/98, 82-5304/5/6/7, and 82-5511/12

UNITED STATES OF AMERICA
vs.
AIMONE, GILDO, Appellant in No. 82-5290
DENTICO, LAWRENCE, Appellant in Nos. 82-5297 and 82-5511
D'AGOSTINO, DOMINICK, Appellant in Nos. 82-5298 and 82-5512
MUSTO, WILLIAM V., Appellant in No. 82-5304
SCARAFILE, FRANK, Appellant in No. 82-5305
POWERS, JOHN J., Appellant in No. 82-5306
GENOVISE, ANTHONY, Appellant in No. 82-5307

(D. C. Criminal Nos. 81-144-01/02/03/05/06/07/08)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE ----- DISTRICT OF NEW JERSEY

Present: ADAMS and WEIS, *Circuit Judges*, and VAN ARTSDALEN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ----- District of New Jersey and was argued by counsel May 11, 1983.

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* Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered May 13, 1982 in Criminal Nos. 81-14407, 81-144-05, 81-144-06, 81-144-01, 81-144-02, 81-144-03, and 81-144-08, appealed here resepctively at Nos. 82-5290, 82-5297, 82-5298, 82-5304, 82-5307, 82-5306, and 82-5307; and from the Orders of the said District Court entered August 10, 1982 in Criminal Nos. 81-144-05 and 81-144-06, appealed here respectively at Nos. 82-5511 and 82-5512, be, and the same are hereby affirmed.

ATTEST:

Clerk

August 25, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ORDER DENYING A REHEARING

Nos. 82-5290, 82-5297/98
82-5304/5/6/7, 82-5511/12

UNITED STATES OF AMERICA
v.
AIMONE, GILDO,
Appellant in No. 82-5290

UNITED STATES OF AMERICA
v.
DENTICO, LAWRENCE,
Appellant in Nos. 82-5297 and 82-5511

UNITED STATES OF AMERICA
v.
D'AGOSTINO, DOMINICK,
Appellant in Nos. 82-5298 and 82-5512

UNITED STATES OF AMERICA
v.
MUSTO, WILLIAM V.,
Appellant in No. 82-5304

UNITED STATES OF AMERICA
v.
SCARAFILE, FRANK,
Appellant in No. 82-5305

UNITED STATES OF AMERICA
v.
POWERS, JOHN J.,
Appellant in No. 82-5306

UNITED STATES OF AMERICA
v.
GENOVESE, ANTHONY,
Appellant in No. 82-5307

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and VAN ARTSDALEN, *District Judge**.

The joint petition for rehearing in banc of appellants WILLIAM V. MUSTO, FRANK SCARAFILE, JOHN J. POWERS and ANTHONY GENOVESE, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons did not participate in the consideration of this matter.

BY THE COURT,

_____
Circuit Judge

DATED: September 19, 1983

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* The Honorable Donald W. Van Artsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.